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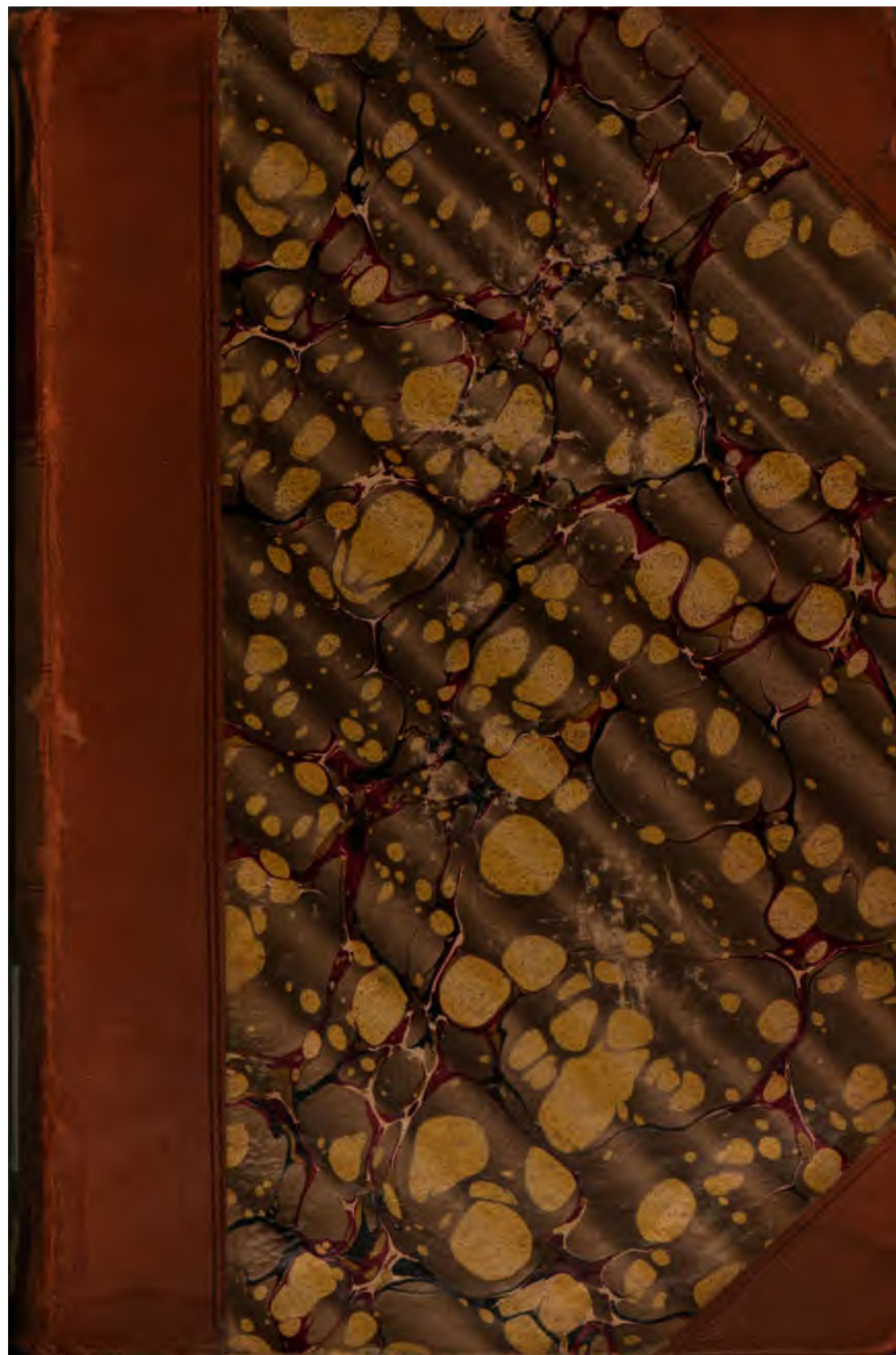
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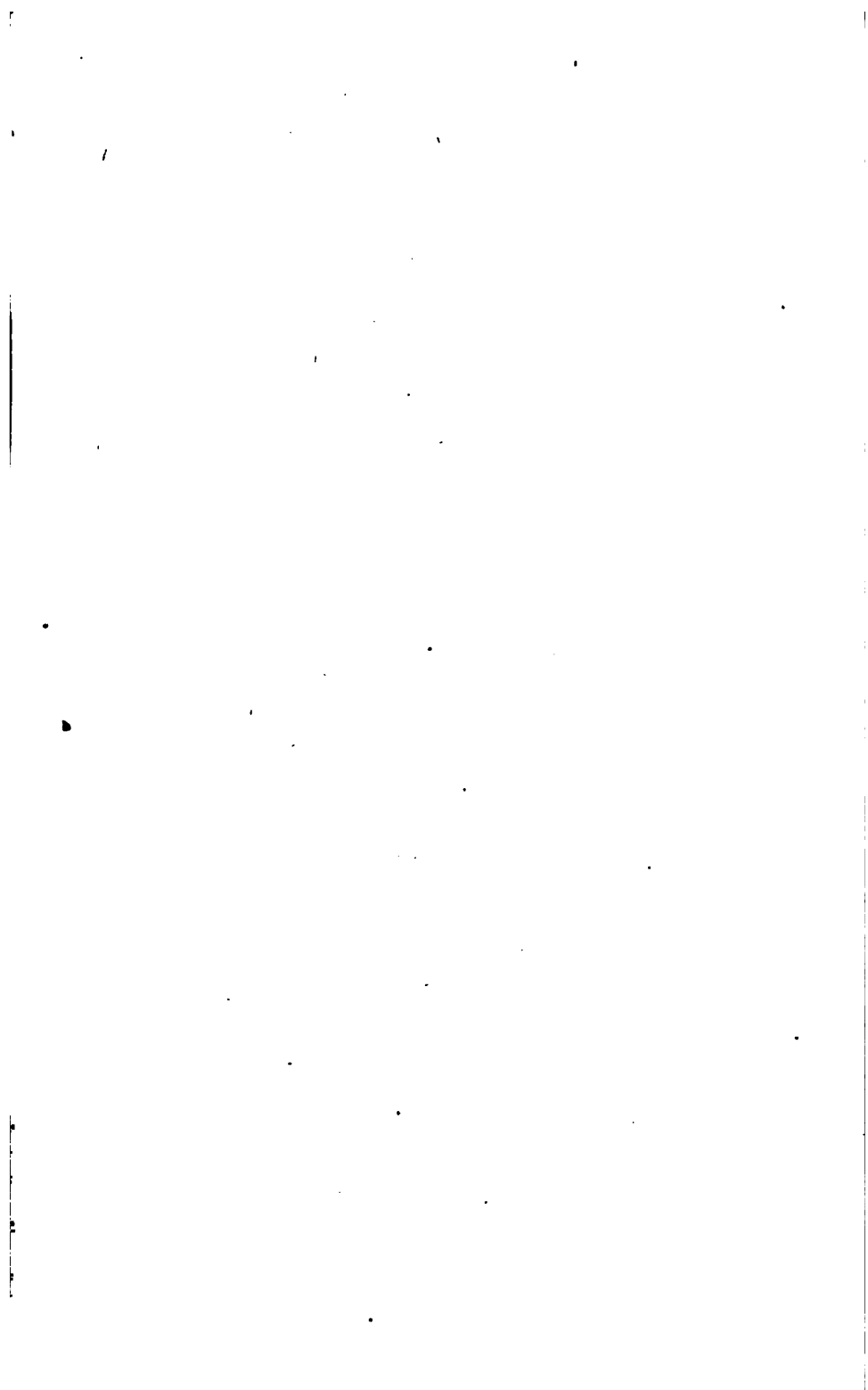
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OR
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OF
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THE
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ART. I.—COUNTY COURTS.

BUSINESS is flowing from the superior into the County Courts to an extent which threatens to make almost a revolution in legal economy. Its effects on the public as well as on the profession are likely to be exceedingly great. There is scarcely a county at these assizes which is not in all probability giving ample evidence of the new outlet to litigation thus opened.

This influx of business in the County Courts appears to be of three kinds: First, it consists of the small debts, which, under no circumstances, occupied a place in the business of the superior courts; this is partly a transfer from the old Courts of Request, County and other inferior Courts: but it consists far more largely of claims, which, from the absence, distance, or powerlessness of such courts, were virtually irrecoverable, and which may therefore be considered as new business. In the second place, a number of suits are now brought in the County Courts for claims which must, if at all, have been enforced in the Superior Courts, but which, from the expense thereby incurred, never would have been enforced at all. Thousands of such claims, instead of being compromised or abandoned, are now entered in the new County Courts, and disposed of with almost as little cost and trouble as if referred to a friendly arbitrator. By neither of these classes of business, however, is that of the Superior Courts at all invaded. The third class of suits in the new courts consists exclusively of those causes of action which would have been otherwise tried at *nisi prius*. This class of cases is, as we have observed, telling upon the courts of *nisi prius*. Nor alone upon them;—for owing to the

power given to the judges of the Small Debts Courts finally to determine all questions of law as well as of fact, the province is in like measure invaded of all the courts above. We have heard since this act came into force of points of law decided off-hand by judges of the Small Debts Courts, quite as difficult and doubtful as many of those which the judges in Banco take time to consider; yet actions on contracts seem, as every one knows, with nice distinctions of doubtful law, and abound more than any others in a complication of facts. The act, not satisfied with transferring to the New Courts all contracts within the twenty pound limit, extends their jurisdiction to all personal actions, with a few exceptions; it extends also to partnership accounts, and enables legatees to recover in it legacies under a will, and also distributive shares of the property of an intestate. [S. 65.]

We do not complain of this extensive scope of jurisdiction as regards causes of action: the latter provision with regard to legacies is one of great practical benefit, inasmuch as many thousands of legatees have been defrauded of small legacies by rascally executors, solely in consequence of the impossibility of hitherto recovering them. Considering, however, the enormous quantity of points of evidence and practice which each judge of these courts is bound to have at his fingers' ends, if we may be allowed the expression—considering also that the usual avocations and responsibilities of the new judges are augmented by the additional functions of the jury they supersede, we are strongly of opinion, that had the scope of the act been limited, at any rate in the first instance, to debts of ten pounds, prudence would have been better consulted, and the real utility of the measure by no means lessened. In taking from suitors in these courts all power of appeal (except to the judge) for a new trial, powers are vested in these gentlemen, with respect to at least one-half the whole bulk of litigation in this country, far exceeding that confided to the superior judges. We believe we do not overstate the facts. We are no opponents of rational improvements in the administration of the laws, by which the public may benefit, even though the profession might apparently suffer by them; but, on the other hand, we cannot lose sight of the fact that the public interest is itself concerned, that improvements in the facility of justice be not effected at a sacrifice of its quality.

We have no doubt that a great number of suitors, who have recovered their money without trouble or expense, are highly delighted at the new act, and have little reason to quarrel with its judges; nor are those less fortunate parties, against whom judgment has been given, any better qualified to detect the

ignorance of law, confusion of its principles, or misapprehension of evidence, which may happen to have misled the judge into error. The popularity therefore of the new measure, great as it may be, is no sure index to its real value. If we find that eagerness to avoid the expense of a deliberate trial has induced men to forego substantial justice in their search after economy, it may eventually prove expedient to diminish the scope and raise the standard of this new branch of judicature.

On the first appearance of this act, we commented on the impolicy of restricting the selection of judges to barristers of upwards of seven years' standing for this office, it being obvious that very few really competent barristers of *more* than seven years' standing exist whose business prospects are not by that time too good to be sacrificed for ever for no higher salary than the new judgeships promise, and which in *many* cases will hereafter fall to 7 or 800*l.* per annum, when the present accumulation of cases is over: and it is by no means incumbent on the Treasury to allow more in the shape of salary, no *minimum* being fixed by sections 39 or 40. The result necessarily was that *not many* very competent men could be found to fill these offices, requiring nevertheless judicial aptitude and qualifications of no usual calibre. The men who are willing to abandon all their professional prospects, after being seven years or upwards at the bar, are *usually* those who have failed to realize any prospects of greater value. Much complaint has been made of the incompetency of some of the judges, and a catalogue of strange decisions might certainly be selected as edifying specimens of the new law propounded in the new courts. Nevertheless upon the whole the standard of judicial competency attained is quite as high as could reasonably be expected. The names of Starkie, Manning and others, adorn the list, and form very decided exceptions, of men realizing to their respective districts the uncommon union of cheap and sound law. We cannot, however, say that they form any sort of sample of the general body of their colleagues. Not only are the judgments in complicated cases very frequently given off-hand, but after a long case has been gone into, and several witnesses examined, the judge is expected to sum the case up in his own mind, without the assistance of reading over his notes. We have heard great murmurs against judges who delay their decisions for this purpose. They are therefore expected not only to possess a universality of legal knowledge, judicial aptitude and grasp at facts which neither judge or jury ever possessed before, but are also to perform the separate functions of both at once. It is not much to be wondered at that blunders frequently arise, and

County Courts.

that the majority of cases requiring extraordinary acumen are decided on a principle very nearly resembling a lottery, and that a decision in one court, even on some definite point, one day, is sometimes decided the other way the day after: take the following as an instance; we cite three cases recently reported in the same number of the Law Times:—

“ MIDDLESEX.

Brompton, Tuesday, June 17.
(Before ANDREW AMOS, Esquire.)

CRAFT v. COX.

*Jurisdiction—Another action pending in superior court.
Quære, may an action be brought in the County Court, another action being pending for the same cause in the superior courts.*

Herbert, before the case was gone into, called an attorney, who proved that plaintiff had brought an action in one of the superior courts against his client, the defendant, for the recovery of the same debt; that plaintiff had declared that defendant had obtained an order for the delivery of the particulars of the plaintiff's demand, which had not been obeyed, and that such action was still pending. Defendant's attorney, therefore, submitted that the court had no jurisdiction.

The JUDGE was, however, of opinion, that as plaintiff had not obtained judgment in the action, the objection was untenable.

Herbert applied to the judge to take a note of his objection, which his Honour did, and gave him time for consideration, and leave to mention the case again at the rising of the court.

The trial then proceeded.

Judgment for plaintiff; damages, 1s. 5d.

Herbert, at the rising of the court, again submitted that his Honour had no jurisdiction, and cited the case of *Kerbey v. Siggins*, 2 Dowl. P. C. 659.

The JUDGE said he had been reconsidering the matter, and, without determining the question whether in this action he had jurisdiction or not, he was of opinion that defendant's evidence of the *lis pendens* in the superior court was not sufficient, and that he should have produced the different proceedings in the action.

LANCASHIRE.

Manchester, Wednesday, June 16.
(Before J. S. T. GREENE, Esquire, in the absence, through indisposition, of R. BRANDT, Esquire.)

ROBERTS v. WILLIAMS.

Action pending in superior court between the same parties no bar to plaint in County Court.

Whitworth, for defendant, applied to the court to have the sum-

mons dismissed, on the ground that an action between the parties for the same cause of action and the same amount of debt, was now pending in the Common Pleas at Lancaster, to which an appearance had been entered for defendant.

His HONOUR said this was no defence, and that he had no power to dismiss the summons, and ordered the cause to proceed.

Thursday, June 17.

(Before HENRY TRAFFORD, Esquire.)

Action pending in a superior court is a bar to plaint in County Court.

* * * * *

Harding, on behalf of a defendant in a case called on this morning, proved that an action was now pending in another court between the same parties for the same debt, when his Honour at once *non-suited* the plaintiff.

It will be perceived, from the above, that two judges in the same court gave different decisions."

Thus one judge leaves as an open question the point, whether *lis pendens* in a superior court is a bar to a trial in an inferior court; another judge holds it to be a conclusive bar; and the third rules it to be no bar at all! This is by no means a singular instance of judicial discord. We cite here merely a fraction of them. Allowance of costs of counsel and of attorney are the rule, and disallowance the exception, in some courts,—while in others allowance is the exception and disallowance the rule. Adjournments of cases simply because one party is not prepared are allowed in some courts without qualification, because they are "in their infancy," and are wholly refused in others. Unsatisfied judgments in the superior courts are held sometimes to be recoverable in the County Courts, and sometimes not. Service of summons on a wife, in the husband's absence, suffices without further proof in some courts, and does not suffice in others. A new trial was very properly granted in one court, on an affidavit that material evidence was omitted owing to the ignorance of one of the parties. In another we find this report given in the *County Courts Chronicle*,¹ which but for its being uncontradicted we should have supposed to be a typographical blunder of no ordinary magnitude:

"*Mercer* having made some application to the judge about a new trial,

"His HONOUR expressed his inability to grant a new trial in any case where the defendant had appeared at a former one."

¹ A very useful record of the proceedings in these courts.

What, then, does the judge imagine are new trials granted for? They are seldom granted in a case where the defendant does *not* appear in the superior courts, nor ought they in the new courts, where the defendant is duly summoned. Law such as would certainly startle Westminster Hall not a little has been held in many more instances than one.

As regards the deportment of the judges, and the order maintained in the courts, we find the following judicious remarks, significant of the existence of strange doings, in the last *County Courts Chronicle*:

"Courts of Request were bear gardens in noise and confusion, and their character was at the lowest ebb. It is supposed, even by members of the profession who have not acquainted themselves with the extensive jurisdiction and the real importance of the County Courts, that they are only Courts of Requests augmented to 20*l*. There is, therefore, a prejudice against them which deters many good men from going into them—a prejudice which can only be overcome by proof that they are courts where a gentleman can appear to conduct a cause without having to bandy personalities, and where he may feel *as much in place* as in an Assize Court. We are fully aware of the extreme difficulty of preserving such strictness of form and order where the business is of so miscellaneous a character, and because of its difficulty, do we thus earnestly urge it upon the notice of all officially and professionally engaged in the County Courts. Nor do we write from impulse alone, or fear of future laxity. Complaints have come to us of a tendency towards it in some courts, which we will not now name, in hope that these remarks, addressed to all, may influence the particular instances to which we allude, but with the full understanding that we shall not hesitate to name hereafter any cases in which it may satisfactorily appear that the officers do *not* maintain for their courts the character after which they ought to strive. *In one instance, the advocates took to calling each other names—one being a barrister and the other an attorney, and the judge suffered them to proceed for a long time, and then merely requested silence, instead of administering a severe rebuke, as he should have done.* In other cases we have heard of an impatience of the cross-examinations and speechies of advocates on the part of the judge which it would be as well to repress; for however tedious and prosy these may be, they are necessary evils, endured for the sake of a greater good, and the judges of the County Courts would do well, in this respect, to take example by the judges at Westminster, and learn to endure patiently the infliction of such tediousness. And, as a general rule, we hope the judges will do what in them lies to encourage instead of discountenancing the attendance of both branches of the profession in their courts. It may annoy them sometimes to have their sittings protracted by the arguments and talk of advocates; but even these are less troublesome than the irregularities of unrepresented parties, and beyond all else does the presence of the profession give character to a court."

It is also complained in some courts that undue haste occurs, and sixty or seventy complaints are the average *per hour*! Many of course are struck out on the names being called: and one of the parties is often absent; but still very improper haste seems to exist in the cases tried in some courts, if one half of the reports which reach us are correct. We are very glad to find that a general feeling pervades the whole body of judges, that it is improper to permit of the appearance in these courts of professional men, by other than professional means. In one case a barrister appeared before J. M. Carrow, Esq., in which the following colloquy is reported to have occurred:—

“*Barrister*.—‘I appear in this case for defendant.’

“*The Judge*.—‘Are you instructed by an attorney?’

“*B.*—‘I am not.’

“*The Judge*.—‘Then I cannot hear you.’

“*B.*—‘I was going to rely on a part of the 91st section, which says, or by leave of the judge.’

“*The Judge*.—‘I would not consent to any barrister in England appearing without being instructed by an attorney.’

“*B.*—‘Of course I must submit to your decision.’

“*The Judge*.—‘Yes; I am quite sure that the act leaves me no discretion; but if it did, I would not consent to it. The act says, “that no person shall be entitled to appear for any other party at any proceeding in any of the said courts, unless he be an attorney of one of her Majesty’s superior courts of record, or a barrister at law, instructed by an attorney, on behalf of the party, or by leave of the judge, any other person.” But that means any other person but an attorney or barrister. If he is an attorney, he must be a properly qualified one; and if a barrister, he must be a barrister instructed by an attorney.’

“*B.*—‘Then no barrister can appear to argue without being instructed by an attorney?’

“*The Judge*.—‘No; I think the act is imperative. If you like to have the case adjourned, in order to be instructed by an attorney, you can.’”

Other judges have likewise refused to allow any persons to appear, except the parties themselves or professional men. We concur in the remarks made by one of the newspapers on this subject some weeks before:—

“The judges of the recently constituted County Courts are showing a laudable desire to give the public every possible advantage in the administration of justice under the new measure. One of the most serious evils to which the suitors resorting to inferior tribunals have been exposed, that of being duped into the employment of sham practitioners, has already received a very decided check from the judges presiding at Southwark and in Bloomsbury. It has been determined in both these places, that persons professing to be clerks

of attorneys and solicitors shall not be heard unless they can give very satisfactory proof that they are acting with the authority and on behalf of their principals. It is perfectly true that the interference of unqualified persons in legal proceedings is not only 'a great and growing evil,' as the judge of the Bloomsbury County Court observed, but it is an abuse to which the new act is calculated to afford considerable encouragement. The fees allowed for professional assistance to suitors are so exceedingly moderate, that there is a probability of the business of the County Courts falling into the hands of the humblest class of practitioners, between whom and the imposters against whom it is so desirable to guard, it may not be always easy to discriminate."

Due attention to the improvement of the conduct of business in these and other respects may be expected to take place, not only in points of decorum, but in the correctness of the decisions.

After allowing for all these defects, a vast deal of rough justice is done in these courts.

If any one imagines that because we point out defects,—which it is very important to the public to have remedied before fresh powers are given to these courts,—therefore we are desirous of running down and depreciating them, we are grossly misunderstood. Our earnest desire is to see them improved, and rendered safe and just tribunals for the recovery of *small debts* and the settlement of *small claims*. We think, as we have said, that this legitimate sphere of action has been unduly extended, but we are not thereby deterred from doing justice to the real merits of the measure.

One or two very important questions have arisen with regard to these courts, to which we shall now apply ourselves.

One affects the attendance of professional men, which appears to us, upon the whole, desirable. A barrister in Gloucestershire, who had been retained to conduct a defence involving an important question of partnership liability, finding ninety or a hundred cases down for trial before his own, and other professional men similarly inconvenienced, applied to Mr. Francillon, the judge, for precedence to those causes in which professional men are engaged, urging upon his consideration the advantages of the attendance of professional gentlemen to the suitors generally, and the propriety of encouraging their attendance, pointing out at the same time that the delay caused by the present system was likely to exclude from the courts precisely that class of professional men whose time was of the most value, and of whom it was most desirable to encourage the attendance. In reply to this application the judge made the following remarks :

" My great desire is to encourage the attendance of professional men in the courts of this circuit, for I am convinced that their assistance greatly conduces to the proper administration of justice in any court, whatever its rank, in which that assistance is rendered. I have therefore given the subject-matter of this application my most careful consideration. To give professional men pre-audience is certainly an obvious mode of encouraging their attendance, and I should be very ready to do so were it not that considerations of greater weight make it in my opinion incumbent on me to prefer the convenience of the numerous suitors who are brought here, as the place where they can obtain redress for wrongs, or resist unjust claims, rather than the apparent interests of gentlemen who come here in a professional capacity. To give pre-audience to the latter would, in numberless cases, inflict a serious hardship upon poor persons who cannot afford professional assistance, and very many of whom would in that case be detained from their means of livelihood, while the cases of the more wealthy suitors receive the consideration of the court. I should add, that my experience in courts, where the convenience of practitioners is apparently more regarded than the regular order of business, has for many years satisfied me that the practitioners themselves would in those courts be more benefited than they appear to be aware of, by cases being taken in their regular order. I am satisfied that priority being given to cases in which professional men are engaged would, in practice, involve difficulties and inconveniences, both to themselves and the suitors generally, which can readily be avoided by the obvious course of taking the cases in the order in which they are numbered. Every person who has had business in the crown courts at the assizes, or at the quarter sessions, or who has had rules pending in the superior courts, is painfully aware of the disadvantages incident to uncertainty, compared with the certainty of which a cause list supplies the means."

There is much good feeling and sense of justice in these remarks; but we cannot quite agree that it is a necessary consequence of precedence being given to professional men that the public or the poor should suffer injury. The obvious mode would be to frame two cause lists,—No. 1 to contain all those which the clerk had notice given him twelve hours before the opening of the court, that professional men were engaged in. No. 2 would contain all the rest. If it were known as a general rule that No. 2 would not begin until No. 1 were finished, where would be the inconvenience to the public? The lists ought to be posted outside the door of the court. We cannot but think this arrangement would meet all difficulties. A practitioner in one of the Welsh courts says,—

" The profession complain bitterly at the refusal of the judge to make a special cause-list of those cases in which professional men are retained. No difficulty could occur, for the minutes of the court

are all prepared in regular series before the setting of the court, and all that has to be done is for the clerk to turn to the number of the case called on, and fill in the blanks. The relief to the court from having two separate lists would be considerable."

Some such arrangement will, we think, be not improbably made in several districts.

We turn now to the far more important question of suing for divided debts. The 63rd section says,—

"That it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts; but any plaintiff, having cause of action for more than 20*l.* for which a plaint might be entered under this act if not more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*, and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of his judgment shall be made accordingly."

Mr. Palmer, the Judge of the Bristol Court, holds that—

"As every order for and delivery of goods formed a separate cause of action, a trader might divide his demand into as many parts as there were causes of action; and, consequently, that if a party owed a trader 100*l.* or any larger sum, for twenty or any other number of orders, neither of which exceeded 20*l.*, he might bring as many actions in this court as there were separate orders or separate causes of action, each under 20*l.*, however large the aggregate might be."

But in a subsequent case he added, that

"where the whole debt did not exceed 20*l.* a plaintiff would certainly be prevented from proceeding in more than one action, and that if he brought two actions or more, the court would, upon application, compel the plaintiff to consolidate them, and pay the costs of the application; for that, as the plaintiff might have comprised his several causes of action, not in the whole exceeding 20*l.*, in the same suit in this court, it would be oppressive to sue out two or more summonses at the same time."

It is probable that the legislature contemplated nothing of the sort. The judgment of Mr. Palmer rests entirely on the use of the words "cause of action." Had it been said that no causes of action (in the plural), or no "demands" (as in the margin), should be divided, then there could have been no doubt on the subject. Each single purchase however, unless there be a special or implied agreement to the contrary, is an integral cause of action; and the clause as it stands certainly does say no more than that such integral cause of action shall not be divided: separate causes of action consequently may be divided. And there are separate causes of action wherever a

man purchases of a shoemaker a pair of boots to-day and a pair of shoes to-morrow. A case precisely in point occurred in 1831¹, where A. became indebted to B. in a sum not exceeding forty shillings for the carriage of a parcel of goods; and in a month afterwards incurred another debt to B. not exceeding forty shillings for the carriage of a second parcel; A. brought two actions in the County Court for the respective debts. In this case Tenterden, C. J. held—

“ I am of opinion that this case does not come within the rule of law which prohibits the splitting of a cause of action into several portions, for the purpose of commencing suits for each in an inferior court; to be so the cause of action must be one and entire. But, in this case, the two items of 1l. 4s. each, *are perfectly distinct debts, the one having no connection with the other*; when the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the County Court, and his having incurred another and distinct debt with the plaintiff afterwards should not, I think, have the effect of depriving the plaintiff of his remedy in the County Court for the first debt. And if he may still have that remedy for the first debt, he has it of course for the second also.”

This is a perfectly intelligible rule. Wherever the debts which it is sought to dis sever were separately incurred, they may be made the subject of separate plaints; and the wording of the statute must prevail against its probable intention. Where they are not, but form on the contrary items in the same agreement, or parts only of one contract, they are then one and the same cause of action.

Mr. Moylan, the judge of the Westminster Court, has endeavoured to give a narrower construction to the act, and is reported to have held :—

“ That when the division of a whole debt is *ex parte* and arbitrary, the plaintiff should not be permitted to bring his case, by reducing it, within the limited jurisdiction of these County Courts. But if the reduction be the result of stipulation, or even of an implied agreement, it has then failed, and cannot be considered a splitting within the meaning of the 63d section of the act. This principle will, I think, prove the safest guide in considering the point, on which difference of opinion exists. In illustration of this view, I will take a supposed case or two to which the principle will be found to apply. A job-master agrees to supply a carriage and horses for what is called the London season, at the rate of one guinea per day. In this case he should not be permitted to make an arbitrary rest at the end of every nineteenth day, and sue in this court as for a substan-

¹ Reg. v. Herefordshire, Sheriff, 1 B. & Ad. 672.

tive debt of nineteen guineas. This, in my opinion, would be a contravention of the statute."

This is a very good illustration of the case of one continuing agreement, which certainly forms but one cause of action. But we entertain great doubt whether what follows is equally sound :—

" Also in the case of a shoemaker or tailor, where any stipulation is made as to cash payments, an implied understanding, founded on the general custom in Westminster, would be that the tradesman's bill was payable at Christmas. The bill was sent in at Christmas, and although it may contain twenty different items of the value of 5*l.* each (each item having been delivered separately in the course of the year,) I never could consider such a bill as fairly divisible into five, any more than into twenty separate causes of action; and I should certainly hold it to be beyond the jurisdiction of this court."

The only ground on which such a case could be brought within the operation of section 63 is, that of the whole of the items having been included in one bill. But this simply amounts to one demand. Mr. Moylan would hardly deny that a tradesman might whenever he chose (in spite of any custom to the contrary) sue for any amount of goods supplied to any customer at any time before Christmas arrived. If so each article sold and delivered at one time forms a cause of action, and that alone is subject to the prohibition of being divided. A series of articles sold and separately delivered are all the world over " perfectly distinct debts;" and, says Chief Justice Tenterden, does " not come within the rule of law which *prohibits the splitting of a cause of action into several portions for the purpose of commencing suits for each in an inferior court, for to be so the cause of action must be one and entire.*"

Again, where, as in the subsequent case of — *v. Nash* (see County Courts Chronicle, p. 37), *an account had been stated*, after a bill, including several separate items, had been sent in, it is clear that the distinct debts were merged into one cause of action. But that is a totally different case to the common one of goods sold and delivered at different times, where no account has been stated. The mere delivery of one bill, containing several items, would not, we think, be deemed sufficient to consolidate them, without some agreement to do so, express or implied. Where there are distinct purchases, there are distinct contracts. The case of lots sold at an auction, for example; *Roots v. Dormer*, 4 B. & Ad. 77.

Another case which also supports the rule we have ventured to suggest is that of *Baldey v. Parker*, 2 B. & Cr. 37. There

A. went to the shop of B. & Co., linendrapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them. The question was whether this was one contract under the 17th section of the statute of frauds: it was held that it was; that it appeared at first to have been a contract for goods of less value than 10*l.*; but in the course of the dealing, it grew to a contract for a much larger amount; and the case seems to have turned entirely on the dealing having taken place at one time, thus forming one transaction. For Bayley, J., said, "It has been asked what interval of time must elapse between the purchase of different articles, in order to make the contract separate; and the case has been put of a purchaser leaving a shop after making one purchase, and returning after an interval of five or ten minutes and making another. If the return to the *shop were soon enough to warrant a supposition that the whole was intended to be one transaction*, I should hold it one entire contract within the meaning of the statute." Thus, when the return to the shop is *not* soon enough to admit of such a supposition, the purchase made each time will be not one but two entire contracts; nor is there any decision to the contrary in the books. Mr. Palmer cites the common case of rent due at different periods as falling (very obviously) within the pale of the same rule. He says,

"It had also been held by Baron M'Clelland, at the Armagh Spring Assizes, that where two processes had been brought even at the same sessions, each for 7*l.* the one for half a year's rent due in May, and the other for another half-year's rent due out of the same holding, at November following, the plaintiff was entitled to a decree in each case, and the learned baron affirmed both on appeal. So at the Lifford Summer Assizes Baron Pennefather decided that where A. lent B. a sum of money, and about four months after lent him another sum of money, A. might sue for each sum in separate actions, even after both the sums were due. Thus it was quite clear that in this case the plaintiff is entitled to split his bill or account, although amounting to upwards of 60*l.*, into separate causes of action, not exceeding 20*l.*, and bring separate actions in this court for each part."

It has been asserted, with very little acquaintance with the

books, that in no case can an action be brought for *part* of a *debt* or duty, without showing the residue satisfied. There is something to this effect in the *index* to Wms. Saunders certainly, but not in the text. That rule applies not to *debts*, but to "debt for *rent* or duty," and refers to an *entire* rent or duty due. See Moor, 7, pl. 26; 1 Burr. 589. A landlord of course cannot sue for the rent of any arbitrary period of tenancy; but if two quarters' rent, or half-year's rent, *payable* quarterly or half-yearly, be due, each amounting to 14*l.*, he can sue in the county court for each separately, although the whole sum due to him amount to 28*l.*

A great deal of useless discussion has turned on the term "cause of action" in the statute; and some commentators have said that the use of the word "demand" would have had a different effect. It would have had so only in cases where several separate causes of action or contracts had been consolidated into one demand: then it could not have been split: now it may, because a demand is not a cause of action. But the common case is that of a tradesman, who has sent in several bills, or who has run up an account, without making one demand of the whole, and has an option of demanding the whole or a part, in such case separate demands might be made of separate portions, without dividing any demand. In order to carry out the view probably entertained by the legislature, it would be necessary to word the clause to this effect:—"No creditor, having any demand or demands against a debtor, shall be allowed to divide the debt or debts due at the time of entering the plaint from the said debtor to the said creditor, for the purpose of bringing two or more suits in any of the said county courts." According to the accustomed negligence with which statutes are drawn, the intent of its framers has been certainly frustrated, and the jurisdiction of these courts has been in this particular unduly extended. It is not improbable that, to avoid any of the doubts raised by Mr. Moylan, tradesmen will send in a bill to persons they think it probable they may have to sue, for goods delivered down to a particular period, limiting the demand in the first instance to the earlier credits. There is nothing to prevent a man claiming and suing for goods sold down to Christmas, 1845, only, although debts for goods since then supplied may have accrued.

It is certainly a serious consideration, how far it is wise to extend the powers of the new system; but apart from this we see no objection on the score of injustice to the debtor in being sued twice or thrice in the county court for his debt instead of once at *nisi prius*. In most cases the expense will be infinitely

less by the former than by the latter procedure, attended, moreover, by far less personal trouble and delay.

A case with regard to the committal of defaulters in the payment of instalments has occurred under the Small Debts Act, which will govern the procedure under the County Court Act in that respect.

The Small Debts Act (8 & 9 Vict. c. 127) gave power to the judges of all the inferior courts of record, and to commissioners of bankruptcy, to summon before them any person against whom a judgment had been obtained for a sum not exceeding 20*l.*, and, on a hearing of the parties, to order payment thereof by instalments or otherwise; and it was provided by section 1, that

"in case such debtor shall not attend, &c., or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered, in which the original judgment shall have been obtained or order made, then, in any of the said cases, it shall be lawful for such commissioner or the judge of such court to order such debtor to be committed for any time not exceeding forty days to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined, within the county, city, borough, or place, in which such debtor shall be resident, &c."

The judges of the Court of Queen's Bench differed whether, under this section, it was necessary or not for the judge or commissioner to summon the defaulter to show cause why he did not pay before committal. A habeas was accordingly moved in the Court of Common Pleas, and the judges agreed that such summons was necessary for the reasons thus stated by the Lord Chief Justice, which are pertinent to the same proceeding in the county courts. The principle, moreover, is laid down with great clearness and power.

"It appears by the section in question that, if a party wishes to recover or enforce payment of his debt, he is to apply to some one of these courts for an order on his debtor, and he is to be summoned, and an inquiry is to take place in the matter. One material part of this inquiry is his means of payment; and the act infers a discretionary power, for the judge is to exercise his discretion with regard to the time to be given for payment of the debt; that discretion depending principally on the means of the individual to pay. He has power to commit in certain cases pointed out by the act of parliament, such as the concealment of property, or misconduct in the mode of contracting the debt: but that imprisonment is not in satisfaction of a debt; it is punishment for misconduct in the original contraction of the debt. But, among other things, a power is given

to inquire: he is to inquire into the means of the party to pay, and if he has means and does not pay immediately, it is to be adjudged when he is to pay. If he can presently pay, he is to be ordered presently to pay; and if he does not do so, he may be committed. But it is obvious it must be clearly known, as material to that act, whether, at the time he makes default, he had the means of payment; for it is to be observed that this statute only deals with the person of the debtor, and leaves all the modes of acting with regard to property under the old acts untouched. By the present act an additional remedy is provided against the person under certain circumstances, apparently with the view of punishing him; but this remedy is only in force on the judge being satisfied that he wilfully withholds payment, and has the means of making it. The act is founded, apparently, on the inhumanity of sending a man to prison when he has not the means of paying, reserving a power to punish him if there is fraud found connected with the debt. The course of proceeding is this: it appears the party is to be summoned, and an inquiry is to be made as to his means of payment; and if it appears that he has the means of payment, by instalments or otherwise, he shall be ordered to pay accordingly. It is necessary, in the outset, that the commissioner shall exercise a discretion as to the periods to be named for payment. It is necessary, that he should inquire into the then circumstances of the party, and as to his future means of payment; because his not being ordered to pay at once, presupposes that he has not the means of paying then, and therefore there must be an inquiry as to his future means of paying: for if he have the present means of paying, he is to pay; and it is only on the presumption that he has not the present means of paying, that the judge, under this act of parliament, would be authorized, acting in the spirit of the legislature, to grant time for the payment. Well, then, if time is granted, with reference to what object is it granted? With reference to the subject of the means—the probable means, and the period when the payment is directed to be made; it appears, as to that point, that after the judge shall have made an order specifying the certain periods of payment—there is to be no other inquiry upon the subject—if the debtor do not pay, but has the means of paying the amount, according to the order of the judge, there is a power to commit for a term not exceeding forty days. What is to regulate the judge in prescribing the period of time for which the party is to be committed? You find that the original order is to be framed with reference to the means of payment; what is to be the foundation of the judgment to be formed with regard to the time for which the party is to be committed? Can it be doubted but that the debtor's means of paying must be at least one of the essential points of the inquiry? And if that is to be one of the essential points of that inquiry, the judge cannot by possibility make an effectual inquiry into the means of paying, or at least with any certainty of his conclusion being well founded, unless he has heard the party who must best know with certainty the means he has of payment, and who is the only person

to know his means of payment. And with regard to the payment, many circumstances might exist of bodily misfortune, disappointment, and loss, which the creditor might have no means of knowing, or any other person likely to be brought before the judge by the creditor. As the period for commitment, therefore, is discretionary, it would seem that the inquiry is to regulate the discretion; and whereas inquiry is necessary to regulate the discretion, common justice and general principles of right will require that the party most interested in the result of the inquiry—the party most fully possessed of the means of best answering satisfactorily the object of pursuing the inquiry, should be heard.”

The clause in the County Courts Act leaves still less doubt on the subject, for sect. 99 empowers the judge to examine a defendant personally summoned for any unsatisfied judgment, and upon inquiry into his means of payment, and the origin of the debt, if satisfied

“That the party *so summoned* has then, or has had since the judgment obtained against him, sufficient means to pay the debt, &c. so recovered against him, either altogether or by any instalment or instalments which the court in which the judgment was obtained shall *have ordered*, and if he shall refuse or neglect to pay the same as shall *have been so ordered*, or as *shall be ordered* pursuant to the power hereinafter provided (sect. 101), it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed, &c. for any period not exceeding forty days.”

There can be no doubt therefore that no committal can be legally made after the hearing, for subsequent default of payment, unless the judge summons the debtor before him, inquires into the facts of the case, and ascertains the propriety of imprisonment.

Several complaints have reached us that this decision will have the effect of warning debtors of the impending danger, and of enabling them to evade justice and make their escape. This may indeed sometimes happen. There are few great principles which are not liable to some defect in their application; and it can hardly be maintained, as Mr. Justice Maule most properly remarked, that “the preventing fraudulent persons from flying the country is an object of sufficient weight to justify a departure, to the extent to which there is a departure from the general principle that a man’s liberty shall not be taken away without a power of being heard.”

A very grave question was mooted with respect to the entire jurisdiction of the new judges on the last day of term, which is still undecided by the courts. The argument is briefly this: section 3 of the act expressly declares that “*there shall be a judge for each district to be created under this act.*” Instead of ob-

serving this, one judge has been appointed for a group of districts. The act says nothing about circuits. They are a pure excrescence, without legislative sanction. If there be a doubt as to the meaning of the words, "there shall be a judge for each district," it is cleared up by the words immediately following, "the County Court may be holden simultaneously in all or any of such districts;" seeming to show that a distinct judge was contemplated for each district, inasmuch as judges are not ubiquitous. It is moreover contended, but with less force, that if the words "there shall be a judge for each district," be not read in their plain sense, and it be competent to unite the 450 districts into 60, it would be equally competent to reduce them to half-a-dozen, or even to one!

This view was supported, it appears, by Sir F. Thesiger, who is reported to have held that the act does not establish a new court, but only enlarges the jurisdiction and regulates the practice of the ancient County Courts, as is indeed sufficiently plain from the preamble; that counties may be divided into districts, in each of which a County Court shall be held; that parts of adjoining counties may be brought within the jurisdiction of any County Court for such district as her Majesty shall order; that there must be a judge for *each* district; that each district shall have the jurisdiction and powers of the County Court, and that the court may be held simultaneously in all or any of such districts; that there is no power of grouping districts into circuits. But moreover there is every reason to think that it was not intended. The wording of sect. 9 bears out the meaning given to the words "*each* district" in sect. 3. Sect. 16 refers to the change of districts by the judges, and is as follows: "And be it enacted, that from time to time, when any judge appointed under this act shall die, resign or be removed, and *the district* for which he was appointed," &c. &c.; sect. 17 is alike significant of the same intent: "And be it enacted, that no judge appointed under this act shall, during his continuance as such judge, practise as a barrister within *the district* for which his *court* is holden under this act," &c. &c. Sect. 19 provides "that the Lord Chancellor may remove any judge from any district to which he shall have been appointed, for the purpose of appointing him to any other district, in which the salary of such judge shall not be less than in *the district in which he shall be so removed.*"

Now it is quite impossible to suppose that, had the act contemplated the junction of districts, all these clauses would have confined the mention of the sphere of jurisdiction to the singular number: the words would have been, "the district *or* districts

in which his court or courts are holden," &c. And this is especially presumable where the subject is that of *salary*, which certainly must have reference, in sect. 19, to the whole sphere of his duties, and not to a part only. Sect. 56 also provides that "the judge of each district shall attend and hold the County Court at each place, &c. within *his district*," &c. The powers of consolidating districts, found to be separately too small, given by sect. 2, seem to provide for cases where the judge, being *confined* to a single district, has too small a jurisdiction. The Queen in Council has created the districts, and has moreover created circuits; now there is an express authority in the act to create the one, but none to create the other.

We do not think it fitting to pronounce any positive judgment on a point submitted to, and pending the decision of the Court of Queen's Bench. We have however pointed out the clauses which incline us to think Sir Frederick Thesiger's objection capable of being supported by formidable arguments. And the court itself appeared to think so, for it was of opinion that the matter was far too weighty for discussion on the last day of term.

It would, perhaps, be no injury to the efficiency of the courts and the utility of the act were this objection held good and a separate judge appointed to *each* district. The circuits are very inconveniently large, and it is obvious that the business is often hurried over in a manner unfavourable to the interests of justice. It could however require that there should be a relaxation of the seven years qualification. The salaries would be of course diminished in the same proportion as the circuits, and it would be impossible to find really competent men capable of the work of above seven years standing. Three years would amply suffice and would give a fair supply of really competent men attending sessions and more or less in practice, who, having been more recently educated in Pleaders' Chambers, would very much excel in competency some who have already obtained the office. Men of business habits, possessed of that aptitude in the conduct of judicial inquiry which is unattainable without attendance at courts of justice and practice in their mode of procedure, are much needed as judges of these courts: nevertheless men have been appointed who had long ceased to attend courts or to practise at all! We have heard of a judge who invariably put the plaintiff to the proof of his case before he ascertained whether the demand was admitted or not, and occupied hour after hour in the proof of uncontested demands!

It has been suggested to us that it is a great defect in the act that there are no powers to the judge to amend, as judges at

nisi prius. We do not think this any defect. As regards complaints, all that the act requires is that "the substance of the action" shall be stated in the plaint and the summons; and it also provides that no misnomer or inaccurate description of person or place shall vitiate either plaint or summons, so long as they are described in such manner as to be commonly known. The substance of the action ought to be properly stated, and if a power of amendment in that existed it might tend greatly to embarrass defendants. No order, verdict, judgment, &c., is to be void for want of form (sect. 136). It would be unwise to give in addition any power of amendment. It would but facilitate and encourage a mischievous negligence.

We regard the entire measure as a means of expeditious justice, very beneficial to commerce, and not necessarily injurious to efficient judicature. At the same time it is open to great objections on the score of the defects we have named, and requires revision rather in the mode in which it has been carried out than in the substantial provisions of the act itself.

As regards the public the measure has proved and is likely to prove very advantageous. Its effects will however greatly lessen the emoluments of the profession. The judges, so far from requiring cases even of doubt and difficulty to be argued before them, are much more prone to decide them on their own impressions: and the frequent refusal of the costs of advocacy is tending not only to exclude the bar from these courts, but to throw the business in them upon a class of practitioners who are not always the best suited to enhance the dignity of the court or to assist the decisions. The efforts hitherto made to render these courts accessible generally to the bar have entirely failed. The smaller class of actions, the most fruitful to the juniors, are drained from the nisi prius courts, railway business has greatly declined, and there seems to be nothing to replace the ominous void.

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WITH POPULATION.

r Trial ennial .	Centesimal Proportion above or below the pe- riod 1837 to 1841.		Centesimal Increase of Population for a period of Five Years be- tween 1831 and 1841.	Excess or Diminution of Commitments to the Population, per Cent.		Mean Centesimal Proportion of Persons signing the Marriage Register with Marks in 1844.
	Increase.	Decrease.		Excess.	Deficiency.	
1842 to 1846.						
959	31.19	..	6.50	24.69	..	55.8
1,458	..	5.14	5.40	..	10.54	41.9
1,439	12.51	..	3.20	9.31	..	49.0
1,310	11.40	..	7.10	4.30	..	48.8
4,336	7.83	..	9.15	..	1.32	45.6
1,404	..	4.36	6.70	..	11.06	45.4
627	..	14.92	2.45	..	17.37	25.1
1,386	10.61	..	7.35	3.26	..	38.6
3,612	9.09	..	3.90	5.19	..	34.7
1,139	..	16.43	4.95	..	21.38	40.1
1,394	45.51	..	13.85	31.66	..	34.3
3,220	..	1.07	4.30	..	5.37	49.8
5,322	3.48	..	5.70	..	2.22	33.8
1,111	3.63	..	1.20	2.43	..	30.9
1,361	..	12.64	4.80	..	17.44	51.9
384	6.07	..	5.00	1.07	..	49.4
4,689	..	1.10	7.20	..	8.30	31.5
6,991	7.62	..	12.35	..	4.73	53.7
2,168	1.26	..	4.75	..	3.49	41.3
2,420	24.67	..	7.10	17.57	..	38.6
1,462	22.13	..	8.00	14.13	..	19.1
1,216	..	4.62	18.45	..	23.07	56.3
3,740	12.04	..	2.85	9.19	..	47.5
1,482	2.35	..	5.50	..	3.15	43.5
1,187	30.58	..	6.10	24.48	..	22.8
1,628	4.63	..	5.45	..	0.82	43.5
1,495	..	3.49	3.10	..	6.59	37.7
164	115.79	..	4.95	110.84	..	23.8
1,988	21.51	..	3.50	18.01	..	46.7
1,728	..	2.47	3.90	..	6.37	40.8
3,122	..	5.62	6.45	..	12.07	33.4
3,113	11.42	..	12.15	..	0.73	51.1
2,620	5.18	..	3.15	2.03	..	49.0
1,725	..	1.04	9.90	..	10.94	20.9
2,329	..	8.12	5.00	..	13.12	34.0
1,510	..	1.72	9.65	..	11.37	40.4
227	34.32	..	1.25	33.07	..	29.1
2,259	..	1.14	3.85	..	4.99	46.9
2,989	20.09	..	5.20	14.89	..	52.1
1,570	18.40	..	8.03	10.37	..	46.2
1,284	8.04	..	7.25	0.79	..	40.8

Prisons furnished by Mr. Farr, of the Registrar-General's Office.

ART. II.—CRIMES AND PUNISHMENTS.

Tables showing the Number of Criminal Offenders in the Year 1846. Presented to both Houses of Parliament by Command of Her Majesty.

CRIME is largely on the increase: and the committals of 1847, as far as we can yet judge, bid fair even to give an increase over that which the Official Annual Return exhibits for 1846, and which has been recently published.

During the three years preceding 1846 a material decrease of no less than 6·7 per cent. took place. This decrease was evidently the result of improved facilities of livelihood to the people, diminishing temptations to commit offences against property, and the mischievous and demoralizing effects of idleness. This improved state of things has wholly ceased, and we regret to record an increase of crime during the last year amounting to no less than 3·9 per cent. in England, and of 3·3 per cent. in England and Wales together. This increase has chiefly extended, as will be observed by the table placed opposite, over the great Northern, Midland, and South-Western manufacturing counties, excepting Gloucestershire, Northumberland and Worcestershire. The counties where there has been a decrease of crime appear to be almost exclusively agricultural.

It is obvious that no useful result can be obtained from these facts without comparing the increase of crimes with that of population; and inasmuch as the change in a single year is merely an index to the immediate, and it may be temporary state of things, we have in the annexed table compiled the corresponding increase or decrease for the quinquennial periods 1837—41, compared with that of 1842—46, so as to show the general tendency during the last ten years. This table has been confined to England.¹

¹ Wales has exhibited no very marked features, except that the population there are infinitely less criminal than those of England, the people in Glamorganshire and Brecknockshire, bordering on the mining district, alone excepted.

It results from this table, that, allowing for increase of population, crimes have *increased* during the *last year* in a *greater ratio* than during the quinquennial period ending 1845, in the following counties :—

Cambridge,	<i>Lancaster,</i>	Suffolk,
<i>Chester,</i> ¹	<i>Leicester,</i>	<i>Surrey,</i>
<i>Cornwall,</i>	<i>Monmouth,</i>	<i>Sussex,</i>
<i>Cumberland,</i>	Norfolk,	<i>Warwick,</i>
Derby,	Nottingham,	Westmoreland,
<i>Dorset,</i>	<i>Stafford,</i>	<i>Wilts.</i>
<i>Essex,</i>		

In these counties there has been the greatest *ratio* of increase, but not of the actual *number* of offenders. The distinction is worth noting, and may be thus exemplified. Supposing that in county A. no crime was committed in 1845, and one crime only in 1846, crime would have increased in the *ratio* of 100 per cent., and would so figure in the tables. Suppose that in county B., in 1845, 3000 crimes were committed, and in 1846, 4000, the actual increase would be no less than that of 1000 criminals, while the ratio of increase would be only 33·33 per cent. Crimes have increased last year, in the largest actual amount, in the following counties:—Lancaster, 220; Middlesex, 201; York, 143; Stafford, 134; Derby, 91; Chester, 79.

The counties in which the greatest ratio of increase of crimes has taken place, during the *quinquennial* period, are, Bedford, Devon, Durham, Lincoln, Middlesex, Norfolk, Northumberland, Rutland, Salop, Westmoreland, Worcester and Yorkshire, containing a population of no less than 5,709,000, where crime has increased during the five years in no less a ratio than 20·6 per cent., population having increased only by 7 per cent. In Middlesex the increase has been very great, and exempt from those fluctuations which mark the progress of crimes in many other places.

As regards the very important point of the *class* of offences which have chiefly increased, the following rather alarming deduction is drawn from the facts by Mr. Redgrave, who has prefaced the official tables with the customary synopsis of the results.

The Offences against the Person—Class 1—were subject to an increase of no less than 14·4 per cent., which included all the gravest crimes of the class, and was most conspicuous in rape

¹ In those printed in italics there was, previously to last year, a decrease.

and attempts to ravish. Offences against the person, which chiefly arise from sudden provocations among the most uneducated and brutalized classes, appear to be subject to greater variations of increase or decrease than the offences against Property; and the relative increase or decrease of the two classes frequently bears little direct analogy, as is the case in the present year.

The Violent Offences against Property—Class 2—are for the most part committed by the older and most daring habitual depredators. These offences had very greatly decreased in the years 1844 and 1845, but last year increased 2·4 per cent. In burglary, however, there was a decrease; in house, shop and curtilage breaking, the numbers collectively continue with little variation. The increase of this class has arisen in the commitments for robberies, in which offence it was considerable.

The Offences against Property committed without Violence—Class 3—include the great mass of the commitments, comprising all the numerous offences committed by those who live by the habitual practice of petty thefts and frauds. Offences of this class slightly increased in the last year, an increase of 2·7 per cent. being spread, with trifling exceptions, over the chief offences of this large class of crimes.

The Malicious Offences against Property—Class 4—may be attributed to the same causes as the offences against the person. They form a very small proportion of the offences generally. They increased 40 per cent. in 1846, and the increase includes both malicious burning and killing and maiming cattle. The commitments are, however, still greatly below the numbers in 1844 or 1843.

In Forgery and Offences against the Currency—Class 5—there is a decrease of 7 per cent., which arises in the commitments for uttering counterfeit coin, the forgeries having increased.

The Miscellaneous Offences—Class 6—have decreased 9·3 per cent., the chief decrease being in riot and breach of the peace. The offences against the game laws, which are included in this class, have increased.

The increase has therefore taken place in very great measure in the worst class of offences—those which arise from and indicate the worst passions. With one single exception offences against the person were never so numerous as last year.

The increase during the quinquennial period, of which the data are given in detail in the tables we have collated from them, is thus distributed among the classes of offence—

	INCREASE PER CENT.	
	In 1846 over 1845.	In 1842—46 over 1837—41.
Offences against the Person	14·39	15·31
Offences against Property with Violence	2·46	15·50
Offences against Property without Violence	2·71	6·85
Malicious Offences against Property	40·26	116·63
Forgery and Offences against the Currency	D ¹ 7·30	13·52
Other Offences not included in the above causes	D ¹ 9·31	12·85

Apropos to the increase of grave crimes is the much vexed question of Capital Punishments. They who desire further relaxations of punishment, and who have put forth such extremely erroneous statements with regard to the diminution of the offences for which capital punishments have been abolished, will receive a conclusive answer in the table with which Mr. Redgrave prefaces the official return on this subject. We have taken some pains to develope, we trust not without effect, the extreme delusion prevailing among a few amiable philanthropists on this point. We trust Mr. Ewart, who is a sensible man, will not suffer his name and reputation to be longer damaged by its association with these futile fallacies. To err in argument or opinion is excusable, but it is quite inexcusable to misstate facts and persist in doing so. The party in question still frequently assert that offences no longer visited with capital punishments have decreased. On the contrary, they have very largely increased. Here are the changes and actual results by which this is proved.

The law remained with little modification until the end of the first of the above periods, namely, 1831. With the second period, 1832—1836, commenced those extensive changes in the law by which capital punishment was abolished for the following offences:—

In 1832. For cattle, horse and sheep stealing, and larceny to the value of 5*l.* in dwelling-houses, by the act of 2 & 3 Will. IV. c. 62.

For forgery, except of wills and powers of attorney to transfer government stock, by 2 & 3 Will. IV. c. 123.

1833. For house-breaking, by the 3 & 4 Will. IV. c. 44.

¹ In both these classes was a decrease.

1834. For returning from transportation, by the 4 & 5 Will. IV. c. 67.

1835. For sacrilege and letter-stealing by servants of the post office, by 5 & 6 Will. IV. c. 81.

It was in the first year of the next period, 1837—41, that the most extensive alterations were made in the criminal code. This was done by the six acts of the first year of the present reign, which abolished capital punishment for—

Forgery, in all cases remaining capital, by 1 Vict. c. 84.

Attempts to murder, when unattended by bodily injuries dangerous to life, by 1 Vict. c. 85.

Burglary, except when persons in the dwelling are wounded or assaulted, and stealing in dwelling-houses, persons therein being put in fear, by 1 Vict. c. 86.

Robbery, unless wounds are inflicted, by 1 Vict. c. 87.

Piracy, except murder is attempted, by 1 Vict. c. 88.

Arson, except of dwelling-houses when persons are therein, and of ships when life is endangered, by 1 Vict. c. 89.

With several other Offences, which are obsolete or of rare occurrence.

In the last of the above periods capital punishment was abolished in 1841, by the act of the 4 & 5 Vict. c. 56, for—

Rape and carnally abusing infants.

Riot and felonious demolition of property.

Embezzlement by servants of the Bank of England and South Sea Company.

Thus the criminal law, which only a few years since subjected to the punishment of death a trifling theft, even though unattended by any act of violence, has, by these extensive changes, been so modified as to restrict that extreme penalty to—

High treason.

Murder and attempts to murder, when bodily injuries are inflicted by which life is endangered.

Unnatural offences.

Arson, when life is endangered.

Piracy, when murder is attempted.

Robbery, when wounds are inflicted.

Burglary, with violence to persons in the dwelling.

Displaying false lights in order to wreck ships at sea.

It is to be observed that the executions have been confined, during the last ten years, to murder and aggravated attempts to murder.

The table which follows is intended to show the increase or decrease of the commitments which has followed the abolition

of the capital punishments, and the diminished proportion of executions for the offences still remaining capital.

NUMBER OF COMMITMENTS FOR OFFENCES WHICH WERE CAPITAL IN THE YEAR 1831, IN EACH OF THE FIVE YEARS ENDING WITH THE YEAR				
	1831.	1836.	1841.	1846.
1. <i>Offences against the Person.</i>				
Murder	317	355	284	369
Attempts to Murder	453	668	937	1,099
Attempts to procure the Miscarriage } of Women	17	29
Sodomy	69	123	122	292
Rape	252	278	319	597
2. <i>Offences against Property, with Violence.</i>				
Sacrilege	58	73	42	57
Burglary	1,299	1,060	2,164	2,701
Housebreaking	2,966	2,744	2,856	2,860
Robbery	1,871	1,829	1,679	2,012
Larceny in Dwelling Houses, persons therein being put in fear.... }	..	10	15	17
Piracy	52	4	8	24
3. <i>Offences against Property, without Violence.</i>				
Cattle Stealing	171	191	205	220
Horse Stealing	946	913	799	747
Sheep Stealing	1,239	1,312	1,760	1,543
Larceny to the value of 5 <i>l.</i> in Dwelling Houses..... }	834	878	897	992
Secreting and stealing Letters by } Servants of the Post Office..... }	17	24	63	85
4. <i>Malicious Offences against Property.</i>				
Arson	212	366	183	581
Felonious Riots and destruction of } Property..... }	148	135	17	188
Killing and maiming Cattle	47	169	163	182
5. <i>Forgery and Offences against the Currency.</i>				
Forging and uttering Forged Bank } of England Notes	72	29	50	25
Forging and uttering other Forged } Instruments	240	321	614	706
Coining	45	70	61	85
Feloniously uttering Counterfeit Coin.	26	5
6. <i>Other Offences</i>	81	25	29	18
	11,416	11,670	13,054	15,370

The increase therefore of these very offences has been no less than 34·5 per cent. in fifteen years! Whilst the number of attempts to murder, rapes, burglaries, robberies and arsons have increased since 1836, that is, during ten years, in the early

part of which they ceased to be capitally punished, to the following enormous extent: Attempts to murder, 64·52 per cent.; Rapes, 114·74 per cent.; Burglaries, 154·81 per cent.; Forgeries, of both classes, 108·85 per cent.; Arsons, 58·74 per cent. ! And yet we are told that crimes diminish in proportion as capital punishments are abolished ! The assertion has no other foundation than its audacity. Murder, it will be observed, which is not exempted from capital punishment, has very slightly increased last year, and during the last *five years has actually decreased* !

We are far from saying that severity of punishment is the fittest mode of making men moral, but we have certainly, in the above facts, demonstration that lenience to great criminals is followed by an immediate increase of great crimes. The truth is, that we have no secondary punishment inspiring awe or effecting improvement, and, until we have, it is in vain to expect any other result from a relaxation of capital punishment than licence to the passions and an increase of crimes. Every hour that the reformation of prison discipline is deferred adds to the responsibility the State has fearfully incurred in allowing punishments to be unreformatory. This is the more to be lamented on account of the large and increasing proportion of juvenile offenders, as evidenced by the following table :

NUMBERS COMMITTED IN THE YEARS										
Age.	1842.		1843.		1844.		1845.		1846.	
	Actual Amount.	Centesimal Proportion.	Actual Amount.	Centesimal Proportion.	Actual Amount.	Centesimal Proportion.	Actual Amount.	Centesimal Proportion.	Actual Amount.	Centesimal Proportion.
Under 16 years.....	1,672	5·3	1,670	5·7	1,596	6·0	1,549	6·4	1,640	6·5
16 and under 20 years.	6,884	22·0	6,726	22·7	6,190	23·3	5,860	24·1	6,136	24·6
20 " 25 "	7,731	24·7	7,200	24·3	6,399	24·1	5,881	24·2	5,856	23·3
25 " 30 "	4,781	15·3	4,419	14·9	3,924	14·9	3,471	14·3	3,655	14·6
30 " 40 "	5,274	16·8	4,839	16·4	4,079	15·3	3,805	15·6	3,972	15·8
40 " 50 "	2,592	8·3	2,399	8·1	2,202	8·3	1,987	8·2	2,120	8·4
50 " 60 "	1,183	3·8	1,044	3·5	1,049	3·9	874	3·6	859	3·4
60 years and above ...	573	1·8	547	1·9	524	2·0	418	1·7	456	1·8
Ages not ascertained ..	619	2·0	748	2·5	579	2·2	468	1·9	413	1·7

This table speaks for itself. The majority of the whole of the criminals are under 25 years of age !

The 9 & 10 Vict. c. 24, empowers Courts to award sentence of transportation for not less than seven years, or of imprisonment

not exceeding two years, for offences which were previously subjected to a fixed punishment of transportation for life, or for a long term of years. It did not come into operation till late in the year; but this statute will eventually lead to a still further reduction, not only of the severity but of the frequency, of the sentence of transportation. Here are the returns of sentences :

	1840.	1841.	1842.	1843.	1844.	1845.	1846.
Death	77	80	57	97	57	49	56
<i>Transportation.</i>							
For life	238	156	191	225	180	79	101
Above 15 years	18	21	37	46	50	22	29
15 years and above 10 years	714	709	726	641	543	405	322
10 years „ 7 years	1,194	1,240	1,402	1,471	1,126	1,119	946
7 years	1,941	1,674	1,841	1,800	1,421	1,273	1,407
<i>Imprisonment.</i>							
Above 3 years	1	..	1	..	1
3 years and above 2 years .	35	10	13	2	13	3	2
2 years „ 1 year ..	548	465	464	464	454	360	332
1 year „ 6 months	2,064	2,060	2,594	2,332	1,927	1,654	1,933
6 months and under	12,462	13,212	14,799	13,477	12,574	12,035	12,635
Whipped, fined, and dis- charged	632	653	601	531	566	398	372

The penal schools, which the Government contemplates starting, will, we trust, afford a remedy for this state of things as regards young criminals, who of course very materially contribute to the stock from which crime in after life springs. The proposed amendment in the laws of transportation will probably effect in a minor degree additional amelioration in our present vile system.

At one of the late quarter sessions held in Gloucestershire, out of 138 prisoners, no less than 65 were not above 20 years of age, and of those, 26 were not above 15. In many other populous districts, the number of juvenile offenders largely exceeds the average for the whole country.

The females, as usual, bear an increased proportion to the whole number of criminals. They have been as follows for the last five years :—

	1846.	1845.	1844.	1843.	1842.
Per centage of Females to Males	26·5	25·6	23·1	22·0	21·6

As regards the amount of instruction possessed by criminals, the results are for last year much as usual :—

Degrees of Instruction.	1837.	1838.	1839.	1840.	1841.	1842.	1843.	1844.	1845.	1846.
Unable to read and write	35·85	34·40	33·53	33·32	33·21	32·35	31·00	29·77	30·61	30·66
Able to read and write imperfectly	52·08	53·41	53·48	55·57	56·67	58·32	57·60	59·28	58·34	59·51
Able to read and write well	9·46	9·77	10·07	8·29	7·40	6·77	8·02	8·12	8·38	7·71
Instruction superior to reading and writing well	0·43	0·34	0·32	0·37	0·45	0·22	0·47	0·42	0·37	0·34
Instruction could not be ascertained	2·18	2·08	2·60	2·45	2·27	2·34	2·91	2·41	2·30	1·78

This, Mr. Redgrave makes a mistake in calling “a conclusive proof of the increase of primary instruction.” It may on the contrary be, that there is a transition of crime from the one class to the other. The whole inference which can be safely made amounts to a presumption that it is as Mr. Redgrave states. The important fact is that the great bulk of criminals do not spring from the wholly uninstructed, but from those who have received a smattering of instruction.

Mr. Redgrave proceeds to state that “a comparison of the relative state of instruction of the two sexes in the returns of the last year proves that the proportion of the females without instruction is much larger than of the males ; and that of those able to read and write well, the proportion is considerably under 4 per cent., while in the males it nearly reaches 9 per cent. :—

Degrees of Instruction.	Males.	Females.
Unable to read and write	29·32	35·73
Able to read and write imperfectly	59·61	59·14
Able to read and write well	8·79	3·65
Instruction superior to reading and writing well .	0·42	0·03
Instruction could not be ascertained	1·86	1·45

“ Although much stress cannot be laid upon the moral restraints to be expected from the small amount of attainment shown by the preceding calculations, they are evidence of the increased proportion not only of criminals, but of the classes from which criminals spring, who, by the spread of instruction, become subjected to those improved habits which attend early control ;

and are at the same time proof of a progress in the lowest grades of society, which must tend to the diminution of crime."

It has unfortunately no such tendency, but has exactly the opposite effect. The "small amount of attainment" comprised in a mere *imperfect knowledge of reading and writing* will not give one iota of "improved habits" or of "early control." On the contrary, they give facilities for crimes without the slightest effect in checking them, or in creating moral improvement.

As a recent writer remarks,

"The wretched superficial instruction we give in reading and writing, and the other mechanical rudiments of learning, *if alone imparted*, effect no sort of moral good. Look at our gaols, by whom are they peopled? By the perfectly uninstructed? Far more largely by those who have received precisely that amount of instruction which, with few exceptions, the schools for which Mr. Baines lauds and magnifies the philanthropy of the land alone give to the great majority of their scholars! Last year, of the 25,000 offenders committed to trial in England and Wales, we find that only 30·66 per cent. are entered as 'unable to read and write,' whilst no less than 67·22 per cent. could read and write,¹ whilst of those who had received a superior education the proportion was 2·12! Can facts speak more plainly than these? We have given the form of instruction without its life and spirit. We have created instruments without teaching how to use them; and of which the proneness of human nature to evil renders the abuse all but inevitable. Our 'education' has been no education: it has taught the alphabet of abilities without the capacity to turn them to good account. It has done too little to inform the mind or improve the disposition, but enough to feed pride and empower passion. Scanty, indeed, has been that higher knowledge which teaches a man to know himself, and opens by mental culture the fruitfulness of knowledge, and those rich stores of information which that culture imparts desire to attain and power to profit by. The natural offspring of our grovelling system is to be found in the growth of selfish principles, cold hearts and froward will."

Apart from this excrescence, Mr. Redgrave has dealt very usefully and skilfully in his prefatory remarks with the facts before him, which are set forth in their usual prolix details, under the head of each county.

¹ Of these 7·71 per cent. could read and write "well;" the rest imperfectly.

ART. III.—REPORT ON LEGAL EDUCATION.

ON the 8th of April, 1846, the House of Commons ordered that a Select Committee be appointed to inquire into the present state of legal education in Ireland, and the means of its further improvement and extension. On the 5th of May following it was further ordered that the inquiry be extended to the state, improvement and extension of legal education in England. The Committee consisted of Messrs. Wyse, O'Connell, Sir Thomas Wilde, Mr. B. Baring, Mr. Rutherford, Mr. Walpole, Sir William Somerville, Mr. Watson, Sir Edmund Hayes, Sir George Hamilton, Mr. Christie, Mr. Milnes, Mr. MacCarthy, Mr. Godson, Mr. Elphinstone. The Report is voluminous, containing a mass of evidence on the subject. We are wholly unable to enter at large on this vital question, or to give even a review of the Report itself in this Number; we are, however, loth to allow so important a document to pass unnoticed until November. We must, however, in this Number confine our comments to the digested conclusions at which the Committee have arrived, and which are printed at the end of their Report.

We rejoice to find that many of the remarks we ventured to make upon this great topic in our last Number are borne out by learned persons whose opinion is authoritative. We were unaware how soon many of the views then expressed by us would be ratified by the Report before us. The Report is so admirable in itself, so conclusive in its opinions, and in every respect so worthy of the attention of the profession, that we shall feel bound to lay large portions of it eventually before our readers.

After commenting upon the dearth of legal education in the universities, and arriving at the conclusion that the law student is left almost wholly to his own individual exertions, there being "no legal education, worthy of the name, of a public nature, in this country," the Committee report as follows:

"4. That it does not appear to us that this state of things is defensible, much less desirable. However undeniable the high reputation for capacity and character which the Bar has attained in both countries, and the great eminence to which some of its members (Mansfield, Blackstone, Sir William Grant, &c. &c.), amidst all these drawbacks, have attained, it is still not less true that their talents would have suffered no diminution by an improved system of preliminary study, that none of their faculties would have been abridged of their energy: whilst it is not less unquestionable that much that is now erroneous and insufficient would have been noticed and reme-

died, and that the profession and the public generally would have largely gained. The care which we bestow on the education of the theologian and physician, in the interest of society as well as of the individual, arises from this conviction; nor has your committee received any evidence which would lead them to exclude from the operation of such a principle the education of the barrister or solicitor.

"5. That this conviction is not less strong, when we come to a careful consideration of the results of the present want of legal education as they affect the student and society. The general student being without the means even of an elementary legal education as part of his general course in the university, proceeds to the active business of life, and the discharge of duties which a free country and popular constitution confide to him, very inadequately prepared for the purpose. He is called on to act as magistrate, legislator, administrator, with insufficient knowledge, crude ideas, and false views. The professional man suffers still more. The barrister has to obtain his knowledge by practice only, and must, more or less, however it may be useful as an instrument in acquiring immediate wealth, feel when called to a higher sphere of usefulness and duty in his profession, that technicalities will not supply the want of the spirit and wisdom which should regulate their use. The solicitor comes ill entitled, through want of the qualities which sound and careful education can best give, to that confidence and reliance which the very delicate and complicated nature of his duties demand. The minister or consul abroad has experience only to guide him, and, in the many international questions which may arise, looks principally to precedent for guidance and support."

What follows is excellent :

"6. That amongst other consequences of this want of scientific legal education, we are altogether deprived of a most important class, the legists or jurists of the continent; men who, unembarrassed by the small practical interests of their profession, are enabled to *apply themselves exclusively to law as to a science*, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered."

How painfully true is this. With the exception of John William Smith we have scarcely had a single law author since the days of Sir William Jones. We have enough indeed of compilers, and to spare; but of jurists, who have added to the literature of jurisprudence, how scanty is the number and how jejune the fruit they have yielded us. The evil is traced, in these remarks, to the following sources :

"7. That we do not ascribe these defects to individuals, but to our peculiar system and practice. The legal education of the continent is conducted almost exclusively in the universities, and the universities are regulated on a totally different system from ours. Jurisprudence

forms one, and often the chief of the four faculties. Through that faculty, supplied with numerous courses, and tested by efficient examinations, not only must the future lawyer, jurist, civilian, and solicitor, but the future diplomatist and official, necessarily pass. Nor is this all: to this large cultivation of law the two last must add a large amount of political, statistical, and economical knowledge. Without such preparations, well proved by a series of examinations, there exists no official eligibility. In our universities, not only is the general student uninitiated in such studies, but even if he were disposed to attend to them, his ambition is stimulated by higher rewards in other branches, and by the exclusive and absorbing cultivation of, especially, the mathematical and classical divisions of his course. There is little time, little inclination, little inducement, no compulsion. Degrees in law are no more than cheaply acquired substitutes for degrees in arts. The immediate and practical advantage outweighs the distant and theoretical. It is not under such circumstances that the '*ad libitum*' law-courses of the universities are likely to be attended, and if attended, to be continued with efficiency for any length of time."

The legal education given in our universities never has been, and in all probability never will be, adequate to its purpose. It will never be other than a subordinate study either at Oxford, Cambridge, or Dublin. Degrees are conferred in civil law, but this is a mere titular distinction—in many cases the distinction of idleness rather than attainment. Civil law was formerly taught in the schools, and indeed, in early times, it formed the fourth element in the *Quadrivium*, added to the ordinary routine of grammar, rhetoric, and logic, which constituted the ancient *Trivium*. The teaching of the civil law was never very successful. The Vinerian professorship introduced Blackstone and Woodeson, but it is by no means a corollary that lawyers owe the one, or conveyancers the other, to the chairs which gave them a means, but assuredly not the *only* means of making their powers known and available to the world,—powers which derived nurture and development less from collegiate teaching than their own mental vigour. That the style in which the Commentaries are written was partially attributable to the classical education Blackstone derived from Oxford may be true: but it arose not from his legal education there. A flowing, ornate style was indeed well suited to a panegyric designed to veil the indefensible defects and laud the manifest merits of English laws. But the portions of the Commentaries most open to the admiration of the rhetorician are usually least useful to the lawyer. The studies of Oxford supply precisely that portion of the basis of legal or forensic power which they contribute to the general education of any gentleman designed for

any other profession than the bar : to that of a lawyer peculiarly they contribute nothing.

The mathematical sciences are more useful in educating and strengthening the powers needed by a lawyer, and Cambridge has produced better lawyers than Oxford ; its studies strengthen the reasoning powers, but they do little more for the culture of the legal mind. Induction differs from the art of reasoning on moral probabilities, still more from the knowledge of life and nature essential to the advocate. Neither does mathematical discipline teach critical discrimination of the powers of language and precision of terms,—each indispensable to the Pleader and Draftsman. Logic is more ancillary to law, but it is cultivated in neither University to any great extent ; and, admirable as are these ancient and venerated institutions for the culture of the sciences and letters needful to the scholar, they may be said to contribute no further to legal education than does general education. At Cambridge, indeed, there is a foundation set apart for law studies, nobly endowed, but very ill adapted to its object : so ill adapted or ill administered (it matters not to our argument which) that the men of Downing College are almost all of them Fellow Commoners,¹ and in no College in Cambridge is much less law learnt or less instruction given. The Report of the Select Committee sums up the sterility of University law teaching thus :—

“ In none of our collegiate establishments, serving as places of preliminary study to our universities, are any legal courses, however elementary, pursued. In neither of the two great universities of England, Oxford and Cambridge (the latter claiming a faculty of law), are there more than two chairs, the one on civil, the other on English law ; one of these chairs is usually neglected, the attendance few, or none, the lectures, from want of hearers, even where the professor is zealous, so rare, that they have been finally discontinued ; the other, though the more efficient, and better frequented, is still inadequate ; the degrees conferred require for their acquisition a very small degree of application or acquirement ; the certificate of a very limited number of lectures, and a few exercises, are sufficient. The University of Dublin is in nowise superior in any of these particulars, whatever be the exertions or wishes of professors. In the University of London, especially in University College, efforts have been made to supply these wants, and for a time proved successful. In the College of Haileybury, such requirements have been better met, but they are limited to students for India. There is thus no course, sufficiently extensive, available, or accessible, for the general student, still less for the professional.”

¹ The highest grade of under graduate, privileged in various exemptions from industry and discipline, more luxuriously fed than the rest, and decorated with gold tassels and braided robes.

The institutional means of legal education afterwards afforded are still more barren. The Report truly enough says,

"The Inns of Court have long since, in England, discontinued their lectures and readings; in Ireland they do not appear to have been ever given. Exercises, altogether nominal, have been substituted; and these, with a certain number of attendances, or presumed attendances, on dinners, are the only conditions at present insisted on for admission to the Bar. No better provision has been made by the public for the instruction of the solicitor. Substitutes and remedies for these defects have been sought by the future barrister, in attendance at a special pleader's or conveyancer's office; and by the future solicitor, in being articled to the solicitor, and by being required to answer an examination previous to admission. But the first, though well calculated to communicate minute practical knowledge of forms and technicalities, cannot be considered as a substitute for that systematic and comprehensive information, and philosophic spirit, which are the highest qualities of the lawyer; and the second, as usually conducted, though useful in training to the mechanical drudgery of the Profession, is not sufficient for the higher and more important duties of the solicitor,—defects much enhanced by his previous indifferent education, and the absence of sufficient educational or examination tests. No professional education of any extent, or at all adequate to the end in view, is provided for the practitioner in the Ecclesiastical Courts, the diplomatist, or the administrative professions, which on the Continent have attracted the greatest attention, and for the education of whose members such ample means have been contributed by the state."

The remedy is a question of such grave importance that we here place on record the entire recommendations of the Committee, which certainly deserve much consideration, although some of the proposed measures may be open to doubt, and give rise to discussion.

"8. That your committee have not, however, come to the conclusion that this state of things does not admit of correction; on the contrary, they have received, during their course of inquiry, very direct and unquestionable proofs from all classes, professional and unprofessional, not only of the necessity, but also of the facility of reform. Already commencements, with no small degree of success, have been made, by the establishment and operations of the 'Law Institute' in Dublin, and in London and Manchester by the institution of their respective Law Societies. The concurrent evidence of many eminent members of the profession is not less indicative of general assent to these opinions; but even were this wanting, we have, in the recent recognition of the same principles, and in the efforts for carrying them into operation in the proceedings of the University of London and the Inns of Court, not only testimonies to the same effect, but encouragements and pledges for the future. The period

thus appears to have fully arrived when larger, wider, and more systematic co-operation may be demanded and expected, and when suggestions from the Legislature will not be disregarded by the public, but especially by professional bodies. In these matters the best labourers are the voluntary, and no reform is likely to be so general, effective, or permanent as that which is the result of the calm deliberations and matured convictions of those directly concerned.

“ 9. That a system of legal education, to be of general advantage, must comprehend and meet the wants not only of the professional, but also of the unprofessional student.

“ 10. That legal education for the general unprofessional student can scarcely be commenced on any extended scale, earlier than the period of university education; and that it will be therefore unnecessary to offer any recommendations in reference to preparatory or high schools, or other institutions of a more collegiate character, with the exception of the provincial colleges, Ireland, which, being constructed on the university principle, and likely to prove at some future day colleges of an university, may admit the establishment, amongst other chairs, of chairs of law, for which permission is already given by the charter. As, however, it may be apprehended that in incipient institutions less interest and demand may be felt for such department, especially when established in the provincial towns of Ireland, it is deemed advisable, with a view of general or non-professional, rather than of professional education, that such chairs should comprise, amongst their courses, besides the general principles and elements of jurisprudence (the base and introduction to all legal study and the natural sequel to history, mental and moral philosophy), courses also of constitutional law, comparative constitutional law, political and commercial geography, statistics, and political economy.

“ 11. That an outline of the history and progress of law, with the elements of jurisprudence, from approved text-books, might very advantageously form a portion of the under-graduate's course in the English and Irish universities, in continuation and illustration of the elements of history and mental and moral philosophy: and should the present course of academical studies be so extensive as to preclude such addition (which may be doubted), such portions thereof as are of comparatively minor importance might be suppressed, so as to allow the proposed law studies to be substituted.

“ 12. That, in order to give efficiency to such change, two examinations should be admitted,—the one of the character usually required to qualify for degrees in arts, the other such as is required for honours.

“ 13. That, with a view of making similar provision for the more advanced students, especially such as propose to devote themselves to the legal or even clerical profession, it appears essential that greater efficiency should be given to the existing chairs; and in proportion as the study shall be more cultivated, greater extension to the courses and a greater number of chairs to each department. To realise this,

it will be necessary that greater advantages should be attached to the law degrees, and a greater amount of study and knowledge be demanded for their acquisition. Certain situations, now limited to barristers of seven years' standing, might be, with due precaution, extended (provided such other reforms accompanied as really rendered degrees evidence of study and ability) to bachelors of law; others, again, more valuable and important, to doctors. For other offices, again, of a mixed administrative and legal, or even of a purely administrative or official character, might, as a condition of eligibility, be required (after a certain period, of which due notice should be given) the degree of doctor. It is the influence of this regulation, to a degree, which contributes so materially to raise and encourage legal studies on the Continent. The conditions for the acquisition of legal degrees might, with the approval of the judges, be easily rendered more stringent. A rigorous examination, preceded by certificates of attendance on lectures and by minor periodical examinations at the close of each course, should be exacted. Optional courses can only be of avail when the taste and utility of such branches of study is widely and intimately felt. It would, perhaps, be better at first to have none but such as are strictly obligatory. Connected with the chairs of civil law might be instituted chairs of international law and colonial law, for such as might find it necessary or advantageous to attend them; and with the chair of English law, and subsidiary to it, chairs of constitutional, comparative constitutional, and municipal law, might successively be established, for the convenience and instruction especially of such general students as might wish to prosecute their studies in the universities farther than the proposed elementary legal course of the under-graduate.

"14. That, to render these lectures of benefit, your committee are strongly impressed with the importance of accompanying all lectures with as much private instruction and questioning as may be practicable, but especially with periodical examinations; which may thus afford tests not merely of a given amount of knowledge, but, to a great degree, of assiduity and perseverance in acquiring and retaining it.

"15. That it appears from evidence before your committee that the professional student could scarcely acquire, even with these additions, that special and thoroughly professional education necessary for professional success at an university. The necessity of residence, the absence of living and practical illustrations of the profession itself, the general and theoretic and unprofessional or popular nature of the instruction given at an university naturally render it necessary for the education of the professional man that some institution more special and characteristic should be provided; in other words, a college of law seems not less important to the lawyer than a college of surgery or medicine to the surgeon or physician. It is the natural close, preliminary to entering upon practice, of that for which the university may be considered in many particulars as the preparation.

"16. That this institution is to be sought rather in the application,

if possible, of old establishments than the erecting new ones, from the guarantee which the former give of order, efficiency, and permanency; and that such institutions are, to a great degree, to be met with in the 'Inns of Court' in both countries. In direct connection with the Bar, under the superintendence of its highest authorities, the judges, or of its most distinguished members, the benchers, with old prescription, ancient privileges, very large accommodations, ample funds, and venerable associations, immediately interested in the progress and honourably jealous of the fame of the profession, no bodies could be more appropriately selected, if willing, or likely to be more willing when once they shall have entered upon the task, than the Inns of Court. No violent or inappropriate innovation is attempted to be forced upon them. They resort only to their own ancient statutes and practices, and resume anew the original objects of their institutions.

"17. That, to give effect to this application of the Inns of Court to the purposes of a special or professional law college, it appears much more advisable that the several Inns in this country should co-operate; and, instead of each providing for its own use or that of its students a series of lectures on all great departments of civil and English law, that they should rather furnish each its quota to the general course in that department which is most congenial to its constitution; and to admit indiscriminately, on payment of the same fees, all students of the Inns of Court, no matter of what Inn, without distinction. The four Inns would thus form, for all purposes of instruction, a sort of aggregate of colleges, or, in other words, a species of 'law university.' The 'King's Inn' in Ireland, adopting the same course, but forming one body, would, like its university, be at the same time college and university.

"18. That, in order to give full effect to these lectures, it appears to be advisable that entrance into the inns of court, like entrance into an university, should be preceded by an examination by way of matriculation, to which should be considered equivalent a degree in arts, but especially, if the changes above recommended were carried into effect in the universities, a degree in law. The lectures should be accompanied with questioning and examination daily, and with an examination of greater length and minuteness at the termination of each course. Finally, before applying for admission to the bar, the student should be required to pass a probationary or qualifying examination, and permitted to go through an additional one for honours, the notice and record of which, after examination, should be kept and published. It has been doubted how far the benchers would be authorized to impose such regulations, but the imposition of certain exercises (though now merely formal), and the condition required of attendance on dinners, seems a very distinct exercise of such power, whatever may be thought of the manner in which it is exercised.

"19. That the appointment or revocation of the professors should be left to the governing bodies of the respective inns, as well as their

endowment; that the endowment should be partly paid by salary and partly by fees, thus combining independence with motives for exertion; the number of lectures regulated as well as hours when given on the joint arrangement of several inns, and with reference to the subjects and attendance on lectures.

"20. That it would be advisable to begin with the great branches only of the law, but highly desirable as the system advanced to add such chairs as in the first instance the exigencies of the profession itself required, and in the next as might be of utility to the profession and to the public generally—such as chairs of international, colonial, constitutional law, medical jurisprudence, municipal and administrative law, &c. &c. In this view also, and for the purpose of giving more extension and at the same time more energy and efficiency to the plan, a system somewhat analogous to that in use in Germany might be adopted, namely, lectures might be given:—some suited to the public at large, or 'public lectures;' others appropriated to the special purposes of the profession, or 'private;' and others again limited to the more diligent and advanced pupils of the professor, or 'most private;' and which last might advantageously be combined with attendance at the special pleader's or conveyancer's office.

"21. That the final examination should be left to a body of examiners, appointed by the inns in common and selected from each of them respectively, with the cognizance and approval of the judges.

"22. That all matters of a common nature might with advantage be discussed, adopted and executed by a joint body, elected from the benchers of the several inns for this purpose. To them might be referred the several questions of arrangement of the course, examinations, honours, &c. thereby virtually constituting them the 'caput' of this legal university. The period of office, mode of election, extent of functions, should be matter of previous regulation by the bodies themselves.

"23. That to give the same constitution and character to the society of the King's Inn, Dublin, to which analogous duties and powers should be entrusted, it would be advisable that it should previously be incorporated, but so as to guard and secure the relative rights and obligations of the two branches of the profession.

"24. That it would be highly advisable to substitute for attendance term dinners in the several inns, attendance on term lectures, the number and nature of which, and how far obligatory, and how far optional, to be determined by common consent and on an uniform plan; and that students in England and Ireland should be entitled to make use of certificates of such attendance, whether in the inns here or in Ireland, as qualifying them (other conditions being also fulfilled) equally for admission to the bar.

"25. That, in providing for the special legal education of a solicitor, a stringent examination should be required in proof of a sound general education having been gone through previous to admission to apprenticeship. That this examination should embrace, in addition

to the ordinary acquirements of a so-called commercial education, a competent knowledge of at least Latin, geography, history, the elements of mathematics and ethics, and of one or more modern languages.

"26. That, for the further education of the solicitor, it would be highly advisable he should also have, even whilst an articled clerk, opportunities for attendance on certain classes of lectures in the inns of Court, and also on others, of a nature more special to his own profession, in the law society of which he might happen to be a member.

"27. That, to render more beneficial societies which embrace the double purpose of surveillance over the profession and of instruction, it would be advisable to keep the purposes distinct, and to adopt, in the appointment of professors, rules analogous to those recommended to the inns of Court.

"28. That the examination of the several courses which the future solicitor should be required to attend, should be marked equally by a certificate and examination, and that the final examination, as a condition for admitting to the profession, should be conducted more in reference to general principles than technicalities (as appears now to be the case), by enlarging and improving the examination papers, and calling in some of the examiners of the inns of Court.

"29. That it should be in the power either of the governing bodies of the inns of Court or of the solicitors' societies to admit the certificates of attendance on lectures in the universities, to a certain extent, as exempting from attendance on their own.

"30. That it might be advisable to found law scholarships and other endowments in either the universities or the inns, or both, for the purposes of encouragement.

"31. That annual reports should be made to parliament of the state and progress of the system in all its bearings.

"32. That these arrangements should as much as possible be carried out by common consent and co-operation.

"33. That, for this purpose, delegates should be invited to meet from the inns of Court, the King's Inn and the solicitors' societies, Dublin, and communications for the same purpose should be had with the universities.

"34. That in the failure only or neglect of such invitation, or refusal to take active and efficient measures to carry into operation the reforms proposed, recourse should be had to a commission,—to be composed, however, partly of legal and partly of official members."

We will now state as briefly as possible the views to which these very important suggestions give rise.

We rejoice that the attempt to graft legal education merely as a collateral or subordinate study on the system of instruction pursued before entering on the period of legal studentship is not sanctioned. In our judgment there is a fund of general as well as classical and mathematical knowledge to be acquired in the days

of pupilage more than enough to occupy the whole time, without further study of the law than such as enters necessarily into that of history. The science of the law, and even, we think, the elements of jurisprudence, will be more successfully learnt after leaving college than whilst there. The time will be more advantageously devoted at college to the culture of the soil than to the sowing of seed which often perishes in a premature growth.¹

The utter sterility of all institutional means afforded after college to the law student for the study of law are too well admitted to need much comment. We have degenerated greatly from the ancient institutions to which we belong. It is not indeed desirable, even if it were practicable, to recal the times when Inns of Courts were, according to Fortescue,² nurseries of virtue as well as schools of law, where "every thing that is good and virtuous is to be learned, and all vice discouraged and banished." It boots little to bewail the days when men placed their sons there "to preserve them from the contagion of vice," when the discipline was so halcyon "that there was scarce ever known to be any picques or differences, any bickerings or disturbances among them." Neither are the ancient modes of tuition or recreation apter to the minds and bodies of modern students than "ipocras chely and pasty of buck" to their degenerate palates. Readings and revels, mootings and malmsey, must alike repose in the memory of the past. We cannot restore the cumbrous procedure whereby lawyers were fashioned of old. Nor happily are we bound down by our accustomed veneration of usage and the authority of precedent in adapting a new system of education to the necessities of our times, for he must be a sorry antiquary who is not aware that the very constitution and rules whereby these venerable foundations were governed were themselves so indefinite and confused that they were liable to be moulded according to the fancy or interests of the ruling powers of each period, as the contrarieties in the history of them clearly show. Nothing appears, however, more

¹ The following answer made by Mr. Blakesly, one of the late tutors of Trinity, Cambridge, serves to show what a mockery and perversion is a law degree at that University:—

534. Mr. *Christie*. Do you know whether the degree of bachelor of civil law is taken in the university with any other object than for the purpose of proceeding to a higher degree?—Unquestionably, I should say that, in many instances, it is sought for because it is a qualification for orders; it is accepted as a substitute for a degree in arts by the Bishop.

535. And it is considered an easier mode, I believe, of obtaining that qualification than obtaining a degree in arts?—I believe it is.

² In his *De Laudibus Legum Angliæ*.

undeniable than the fact, that vast pains were originally taken to fit law students for the profession they entered to learn, which pains are, or at least were until the last year or two, wholly abandoned. Much that was useful ought to be restored; and we would especially point to the following entry in Dugdale's *Origines Juridicales*, which ought to be engraved over the Hall door of each Inn:—

“In 6 Eliz. (2 Maii) there was an order made that none should be called to the Bar, or received as an *Utter Barrister* in this society, before he had been first called and examined by the whole Bench, as by a former order, made 5 Nov., 3 & 4 Ph. & M., was provided. And in 42 Eliz. it was also ordered that special regard should be taken of such as shall be called to the Bar and Bench for their learning.”

In those days the Inns formed a Law University, and there was at least some ordeal of fitness for the profession before men were allowed to practise it.

It appears that if the standard of legal education is ever to be raised in this country, and if there shall be a system of instruction at all, it can alone be done by the means so judiciously proposed in this Report. To carry it out by any other means than by and through the instrumentality of the Inns of Court themselves would have been abortive and improper. No extraneous body, not even the parliament itself, has any right to interfere, or on any pretence to dictate to the Masters of the Bench in each Inn the terms on which they shall call to the Bar. Any attempt to invade their privileges would have been resolutely repudiated, and have failed in doing any thing but creating offence. We must say that this evil has been studiously and successfully avoided. The House of Commons possesses very useful means of eliciting evidence, and it is obviously competent for them to examine into a subject of so much interest to the public as the improvement of the administration of the law, which is certainly involved in the education of lawyers. It is also proper and beneficial that useful knowledge possessed by the legislature should be published. The legislature has done so. It has added suggestions, derived, not however from its own crude wisdom, inapt to legal inquiries, but from the experience and profound thought of practised lawyers high in professional reputation. Very presumptuous would have been the proposal of parliament to the bar that it should remodel its economy, were not that proposal in effect the emanation of legal minds inspired by a wholesome and generous desire to advance the utility of the profession and raise the powers of advocacy.

It is surely desirable that the plan proposed should be carried out. It is to the benchers we must look for the furtherance of this great work, and right glad are we to find that the legal education recommended is such as will have practical development [as a qualification for the bar,—that it is no abstract scheme of general instruction, providing the means and leaving the realization of them to the voluntary disposition of the student. It is recommended that the examination shall be a practical ordeal of professional competency.

The course suggested by Mr. Starkie for effecting these objects in his evidence appears to us very sensible and judicious, and must from such a man have every possible weight and influence:

“ 115. Assuming that it was proposed to establish a good course of legal instruction in the Inns of Court, what is the course you would suggest to the committee as most advisable?—I think that it ought to go at all events to this extent: the giving of lectures, and I think examination would be desirable; I mean, with respect to the call to the bar. I think also that lectures, followed or accompanied by an examination of the pupil himself, would be much more beneficial as a means of instruction than simply lectures; because when lectures are given merely you do not gauge the understandings of the different students who hear you. Some may not understand; others may understand a little, and therefore require explanation; while others understand well. Now, if questions are asked, that gives the party lecturing an opportunity of knowing how far his pupils go with him, and where explanation is necessary; which of course cannot be done where lectures are merely delivered. Therefore, I should think, as a course of instruction, that examination was a valuable addition to the mere giving of lectures. Then there are other steps which are worthy of consideration, which are these: that, if there was no particular temptation to read and to excel, even the delivery of such lectures and such examinations might not be of great effect; but, in order to give fuller effect, it would be desirable that there should be examinations with a view to classification and prizes, and then you rise higher and higher. And it would be a question whether it might not be desirable that the different societies, the Inns of Court, should unite for that purpose and constitute a university, as the different colleges constitute a university.

“ 116. Would you require, as a condition to his being called to the bar, that every candidate should have passed through that course of instruction at the different Inns of Court?—I think either that should be done, or he should undergo an examination, in order to determine upon his competency.

“ 117. One or the other?—One or the other.

“ 118. Or perhaps both?—Or perhaps both.”

We attach much importance to rendering these examinations

compulsory upon all who wish to be called to the bar; otherwise the door is still open to all that which it is desirable to exclude and discourage.

Mr. Starkie thinks the degrees given would have their influence on the solicitors in the selection of counsel. He is asked,

"147. Do you think that pre-eminence in those examinations would carry with it any weight in public opinion in the practical working of the courts?—Yes, I think it would in public opinion; but, at the same time, it is to be recollected that those who have the immediate patronage are the solicitors; I believe them to be a very honourable body of men, and I believe that they would pay attention to those honours in selecting those whom they employed as juniors; at the same time many of them have demands upon them in the way of connexions and relations.

"148. But, *cæteris paribus*, you think solicitors would recognise the merits of those who distinguished themselves in this way?—I think they would; and even now, in the profession, it is always to be reckoned a circumstance much in favour of a young man at the bar, if he has distinguished himself at the university. I think it would be still further considered so if he had distinguished himself, not merely as a classical scholar or as a mathematician, but as a lawyer."

We look upon this as a very subordinate motive. The great merit of the plan is, that it would raise the educational standard of the profession and improve our lawyers. This is the only legitimate object.

Lord Brougham, who gave much valuable evidence before the committee, doubts as to the power of the benchers to compel examination.

"3801. Is it proposed to have a public examination previously to admission to the bar?—None of the Inns of Court have gone the length of saying that there must be a public examination to qualify. They consider that a very difficult and delicate matter. They doubt whether, without the help of the legislature, they would have the right to do it. A person, as the law now stands, upon being entered at one of the Inns of Court, has an inchoate right to be called to the bar; and if the Inns of Court were to prescribe, as a condition precedent of obtaining the exercise of that right, the attending any class, or, much more, answering questions satisfactorily at any examination, we conceive that we should be immediately attacked in a court of law, because it would be said that we have no right to close the doors.

"3802. Could it not be made conditional upon entering the Inns of Court, that the student should bind himself to submit to such examination?—It might be made so; but all the subjects of the king have a right to enter at the Inns of Court, and that inchoate right would be interfered with. It would be just removing the difficulty

a step farther, and bringing it on at an earlier stage. It would be preventing a person from becoming a member of any of the Inns of Court; and I have grave doubt whether the Inns of Court have the power of imposing any such condition; indeed I have very little doubt that they have not. It is to be observed, that an unfit person acquires no benefit from his call to the bar; he only becomes capable of practising, if he can obtain clients."

That there is no absolute right to enter or be called is admitted by Lord Brougham's use of the term "*inchoate right*," which he applies to the right *to enter*. This right, at one at least of the inns, is dependent on an examination. Therefore an "*inchoate right*" is a right determined by the result of an examination, according to Lord Brougham's own application of the term. The *inchoate right* to be called would therefore be nowise interfered with even if it exist (?), by rendering its enjoyment contingent upon a similar event at the completion of the student's studies. It has however been amply shown that the right was long possessed and exercised by the Inns of Court. Why then may it not be restored? We heartily trust it will, for we know nothing else that can in any effective degree raise the bar.

We have merely broached this great question. We shall resume it in our next number.

ART. IV.—ON THE CONNEXION BETWEEN THE
LAWS OF REAL PROPERTY AND AGRARIAN
DISTURBANCES IN IRELAND.

IT is a question of some difficulty and of great interest, how far the social condition of a people may be originated or influenced by laws affecting private property: laws which restrain or affect the tenure, the power of alienation or the line of descent. It may be doubted, whether the form of government even has so much influence upon the spirit and pursuits of a nation as this class of laws: which, though possessing only an indirect action, may in effect entirely divert the spirit of the government from its original direction. Thus a republic, where the law of primogeniture obtains, will not be so republican as a monarchy where the children succeed equally to the possessions of their father: and while the one, swerving from its original equality, progresses towards despotism, or at least towards a strict aristocracy, the other, equally diverging from the path it at first pursued, progresses rapidly by the diminution and dispersion of wealth towards the principles and forms of a democracy. On the other hand we often find, where the natural bias of a nation is adverse to existing laws, that those laws, or the repugnant parts of them, are gradually repealed and smoothed away: and, instead of the spirit of the law moulding and altering the spirit of the people, the law is itself compelled to undergo modifications and mould itself to their will. The laws of property and the spirit of the nation must be in conformity with each other. If the constitution will not permit the requisite changes, a revolution must ensue. This is the simple *rationale* of most of the revolutions which have convulsed the world.

Instances of the former changes, where the existing laws have effected a change in the spirit of the government, may be seen in the Italian republics of the middle ages on the one hand, and on the other in modern France, where the tendency is decidedly democratic. The same gradual change towards democratic feeling is observable in many parts of modern Germany, where however public opinion is not permitted the facility of expression allowed in France, or in this country. Instances of the latter changes, where modification of the law has been found a necessary deference to the spirit of the people, may be perceived in the successive infringements on the old common-law feudal notions in England—such as (not to multiply examples) the rule that all conveyances of land must be im-

mediate, and open, and notorious—and the old feudal disability to devise lands by will. The infringements of modern legislation on these feudal principles were due to the rising commercial spirit of the people: in Scotland, where commerce was of comparatively no account, the old feudal law remained unaltered, and is still in force in both instances—although modern ingenuity has evaded the inconveniences that would otherwise be felt in practice. So too in the United States, among the first acts of legislation after its separation from the parent state, was one abolishing primogeniture, and establishing the rule of equal division among all the children.

Such an influence does this class of laws exert. And if they can bend a monarchy towards republicanism, or bind up a democracy into an oligarchy, we need not stay to inquire generally how far they are capable of influencing the social condition of a people. To this end they are even of more power than the political form or constitution, whatever that may be, of the government. And this will be admitted even by those who would object that these laws, though they sometimes precede, do not always cause the political changes of constitution to which we have just referred: that both the spirit of these laws, and the political change, are originated and caused by the spirit and inclination of the people themselves. The priority is very difficult to be actually ascertained: and in innumerable historical disputes the question is left unsettled. To take the two leading states of ancient Greece: it is a difficult question whether the military spirit of her Sparta was owing to political institutions, or whether those institutions were not rather framed, by the sagacity of Lycurgus, to fit the disposition and spirit which he found already existing. Who shall say whether the commercial and maritime greatness of Athens was owing to her democratic institutions, which made commerce honourable, and placed her at the head of the maritime league, or whether the establishment of democracy was the consequence of her being addicted to commercial pursuits? In all such cases, it is hard to distinguish which class of facts is cause, and which effect: like the two semi-circumferences of a wheel, each is capable of supporting the other, each may with equal propriety be taken as a foundation: and, mutually acting and re-acting, each affords to the other increased vigour and endurance.

It is not usually within our scope, nor is it at present our intention, to make unnecessary allusion to subjects of present political interest. But the war of politics in Ireland has been so violent and obstinate, and has now endured so long, that it is impossible to name any subject which has not been dragged

into the struggle. Every interest has been in its turn an object of contention—and as there is in no country any subject of property that is so obviously of political importance as land, there is none towards which the attention of the Irish legislature has been so constantly directed : nor is there any subject at all of so great political interest, both in its past condition as we read of it in Irish history, and in its present state as we see and hear of it in our own persons ; if we except perhaps the topics of religion and repeal. And these two latter topics, while they are perhaps more capable of exciting the passions of contending partisans, do not to the calm inquirer possess greater interest even in these latter days : nor have they always existed as subjects of discussion at all : and so the laws of real property have perhaps been examined at greater length than any other Irish topic. And although the fiercer contentions for emancipation and repeal have in modern times thrust this into the background, yet it has of late again repeatedly come forward as a subject of primary interest.

It is the function of ephemeral literature to take up from time to time subjects which attract particular attention, and we are tempted to enter this field, though we are aware that it has often been the scene of combat between forces many times surpassing ours, and will be again. It is a subject which has been so often examined, that it is in vain to expect to strike out anything new—yet in spite of Horace's "*Difficile est proprie communia dicere*"—which we shall translate—"It is difficult to make a hackney coach look like a private carriage"—we shall proceed without further generalities or preface to throw together a few of the positions which have been put forward on this subject.

And in the first place it must be fully kept in mind that, important as all laws and facts relating to the possession of land must in all nations be, they are of peculiar importance in Ireland. Land in Ireland is not, as with us, possessed by a resident wealthy upper class, cultivated by a substantial yeomanry, tilled by a peasantry numerous indeed, yet still forming only a minority of those who amongst us earn their bread, in the most literal sense of the words, by the sweat of their brow. Nor does the produce of land constitute in Ireland, as it does in England, the least important part of the total product of the national industry. In all these respects, Ireland is the exact reverse of England. The Irish landlord is in general an insolvent absentee : a hereditary mortgage, like hereditary gout, is essentially aristocratic : a man who has neither the one nor the other can have had no grandfather. In Ireland, again, there is no class analogous to the substantial farmers of England : the

space between the lords and the tillers of the soil is there occupied by a class peculiar to Ireland—*middlemen*: and the tillers themselves, wretched and poverty-stricken beyond the condition of any other class of people in the civilized world, constitute three-fourths of the labouring population. The manufactures in Ireland are principally confined to the linen manufactures in the north; fisheries, mines, and other resources of national wealth, are so far neglected as to be of little or no importance: and by far the greater proportion of Irish exports consists of agricultural produce. Land being therefore at once the principal source of national wealth and individual subsistence, all facts relating to its possession are in a much higher degree of importance than in the case of lands in Great Britain.

If we turn our attention, in the first place, to the history of Ireland, and to the laws and facts which formerly related to land, we shall find there two principal causes at work, each evidently adequate to create great confusion and give rise to agrarian disturbances. These are, the incapacitation on religious grounds of the great body of the people to hold land, except for very limited periods—a term of thirty-one years at a rack rent—and in the next place, the repeated and extensive confiscations of property. The first of these is, we believe, unexampled in the annals of the world. Large masses of the population have, it is true, been in different states debarred of the privilege of holding lands; but these have either been in a complete state of slavery, or they have formed a very inferior part of the physical force of the country; or else there has been an enduring and invincible barrier interposed by making the privilege peculiar to one particular *race* of men; or else the government has been not free and popular, but despotic: whether the despotism of a monarch or an aristocracy. Thus the Helots and *mnoæ* at Sparta and in Crete—the Roman slaves—were incapable of the rights of freemen. The Moors in Spain were at different times deprived of all their possessions on religious grounds; but they were an insignificant proportion of the whole Spanish people, in comparison with the papists in Ireland, and were, indeed, not only put under disabilities but expatriated, whereas papists could not but with difficulty leave Ireland. Jews also have at different times been exposed to many persecutions and denied many of the privileges enjoyed by their fellow subjects, not only in this kingdom but throughout Europe; and they were even banished *en masse*, and all their lands and great part of their moveables forfeited, towards the end of the thirteenth century, by Edward the First, on his

return from the continent,¹ as they were at various times by most other Christian nations. But they, too, formed but an inconsiderable part of the whole population—and while they remained in England, we are not aware of any impediment to their holding lands any more than any other article of property. Goods and moneys, as well as lands, were held by them on very uncertain terms—generally, upon the goodwill of the monarch. The case of the Huguenots, in France, is the nearest parallel to the Irish Catholics; but they, too, constituted but a small minority in comparison with their oppressors.

There are, no doubt, other instances where one part of the population in a state has sought to subject another part to civil disabilities, on the ground of their differing from the religion established by law. We are here speaking only of the disability laid upon Irish Catholics to hold *land*: a disability imposed not by the English legislature upon the Irish, nor by the united decision of the legislature of the whole British empire against the will of the Irish legislature, but by the Irish on themselves, by an Irish House of Peers and an Irish House of Commons—the party carrying the measure being very far inferior in number, and possessing no overwhelming superiority by distinction of birth, race or talents, over the party upon whom the fetters were thus riveted, and being exclusively Irish, though supported, it is true, by the physical force of England. It was a similar effort that had for a time met with a similar result in Scotland, twenty years before: she, too, was oppressed by a legislature exclusively Scotch, though supported by English bayonets. A very different term of endurance was destined to the two nations. The same catastrophe which freed Scotland, fixed these much heavier fetters upon Ireland. But had the tyranny which weighed down Scotland not borne so heavily upon England as to join both countries in a common resistance to the dynasty which oppressed both, it appears doubtful whether the Scotch would not have been as permanently bound by the last acts of the Stuarts, as the Irish were by the first acts of the Orange line; notwithstanding that the more dogged determination of the Scotch, and the superior amount of intelligence and information, more than compensate for their inferiority of number, and render them a less easy prey to tyranny than the Irish. So difficult is it for a people betrayed at home to make head against a stranger.

¹ A.D. 1290. Their banishment lasted three centuries and a half and upwards: they did not return till after the death of Charles I., in the time of the Commonwealth, when they began gradually to return. See Goldsmid on the Disabilities of British Jews.

The difference in the result of the battles of Morgarten, in 1315, and 1798, was not so much owing to the greater inequality of force which revolutionary France, more than Charles of Burgundy, brought against the peasants of Switzerland; it was the dissensions among the people which prepared the triumph, and indeed induced the attack of the French. United, in the fourteenth century, they utterly discomfited the utmost power of the most warlike prince in Europe; divided, in the nineteenth, notwithstanding the heroic defence of the majority, they were totally conquered and overrun in a few months.

The Roman Catholic Irish then were deprived by law of the right to hold lands they had acquired by any title, purchase or descent (for a greater interest than that before specified), unless within six months they renounced that religion and embraced Protestantism. The stroke was submitted to, probably, with the more facility, inasmuch as the extensive confiscations and forfeitures, the last and most extensive of which had taken place only a very few years before, and the undeviating policy which had been followed of regranteeing forfeited lands with a strict attention to the religion of the recipient, must already have secured to the Protestants the principal part of the surface of the island. And these extensive and repeated forfeitures and confiscations constituted the other great branch of facts to which we have referred as being pointed out in the history of the past—and, happily, now only of the past. Not to speak of earlier forfeitures, at the termination of the Earl of Desmond's rebellion in A.D. 1583, so much as half a million of acres was estimated to have been forfeited to the crown in the province of Munster. Nearly as much more was forfeited, shortly afterwards, on the suppression of the rebellion of the Earl of Kildare, in the counties of Meath, Longford and Kildare. Forfeitures in the north to a still greater extent ensued upon the extinction of the rising of the Earls of Tyrone and Tyrconnel, twenty or thirty years later; on which occasion the great Ulster colony was planted by the prudence and ability of James II. and Sir Francis Bacon; though perhaps still more was due to the activity and discretion of Sir Arthur Chichester, the then deputy. Had similar prudence and statesmanship been displayed at the time of the Earl of Desmond's forfeiture, half of Ireland, instead of a fourth merely, might have been filled and permanently occupied by an industrious, enterprising and useful race; but the statesmen under Elizabeth, more intent upon rewarding party followers and gratifying party resentments, than upon discovering or establishing any permanent good to the kingdom, granted vast tracts of this extensive forfeiture to individuals

who, in their turn, regranted the lands thus acquired to the original owners, we are told, *upon a permanent tenure*; words which seem to point at the origin of a tenure very general in Ireland, and not less mischievous than general, *leaseholds for lives renewable for ever*, which we shall presently consider at some length.

The extensive system of forfeitures which had periodically been enforced in Ireland, and of which we have just mentioned these instances, encouraged the arbitrary government of Charles I. to declare with very little ceremony the whole province of Connaught forfeited. The proprietors in that province had been induced to surrender their lands to the crown, and to take them back again, regranted on the feudal tenure, to be held *in capite*. But they neglected to enrol these grants, and Charles, or his advisers, did not hesitate to attempt to take advantage of the omission, and declare the whole forfeited as just stated. The slightness of the occasion indeed, and the meanness of the motives which had induced the crown to put forward this claim, caused its very ready abandonment upon terms which unveiled the main object of the government. The pretended forfeiture was waived upon a payment by that province of 120,000*l.* in three years. If we could overlook the enormous injustice contemplated, and if there had been any security that Charles would have imitated his father, in the use to which he would have devoted the forfeited lands—which indeed the troubles in this island had scarcely left him the leisure to attend to, besides that such a colonization would have deprived him of useful subjects at home—we might be pardoned at the present day, at the distance of two centuries, in regretting that Charles thus resigned his prey. If Connaught, in 1630, and Munster, in 1583, had been established in the same manner as Ulster, in 1610, to what different destinies might not Ireland and the whole British empire have been called! It has been the curse of Ireland that free political and municipal institutions have been awarded to it before it had attained political ripeness: freedom, the most precious, the most dangerous of all gifts, because it can never be recalled. It is too late, when the result shows the experiment to have been premature, to retract the irrevocable fiat: for good or ill, it stands. The seedling cannot, when it feels the frosts of the too early year, retire back beneath the surface of the earth, to seek shelter from the unexpected blast: the boatman once borne on the eddies of the rapid, in vain turns his eyes to the quiet shores he has left. And when a people has once been admitted to free institutions, they cannot be removed, save by a national convulsion, which overwhelms them; or the lapse

of ages, which saps their foundations and eventually overturns them.

But all previous forfeitures (except indeed that upon which the colonization of Ulster ensued, and which has left such enduring results) were of minor importance and extent in comparison with that which ensued upon the conquest of Ireland by Cromwell; when that rebellion was finally quelled which had broken out against the authority of the king in 1641, by the massacre of the protestants in Ulster; a rebellion in which the "the old distinctions of Irish and English blood were obliterated in those of religion; which had become a desperate contention, whether the majority of the nation should be trodden down to the dust by forfeiture and persecution, or the crown lose everything beyond the nominal sovereignty over Ireland." This conquest, which Clarendon compares, for bloodshed and for the sufferings of the vanquished, to the conquest of Jerusalem by Titus, was not completed till 1653—and was almost immediately unsettled by the Restoration. Then the hopes of all ran high, for the recovery or confirmation of their titles—Cromwell's conquering legions, who were in actual possession, the lands having been granted to them, as to Octavius's veterans, in satisfaction of their arrears of pay, grimly awaited the ratification of their claims—for the new king was the king of England, and they had fought for England; he was restored by Monk's army, and they had been that army's brethren in arms. The old loyalists who had fought for their king, and had refused to extend or support the empire of an usurper whom they disdained, hoped highly—for who had been so faithful as they? and the conquered and ultimate conquerors had alike been arrayed in arms against the sovereign to whom they now turned for the reward of their long fidelity. And the old Irish Catholics hoped—for the king's inclination to the old religion was not unknown, and they thought that twenty years of bloodshed and of woe might win an act of grace from a young sovereign returning after years of exile to the throne of his fathers. Thus there were hopes and humble prayers to satisfy, and long services and sufferings to reward and soothe, and stern looks and firm grasps to soften and conciliate, till two Irelands would not have sufficed that every one should have but a little—to say nothing of the jealousies and heartburnings of two classes, even though their own demands were fully satisfied, if the third had obtained what they prayed.

The lion got the lion's share in this division as in all others; and notwithstanding the lenity of the government commissioners appointed to examine into the guilt of parties charged

with having taken part in the Rebellion, the Irish Catholics came by far the worst off in the partition; and by the Act of Settlement, as it was called, of all these various and conflicting interests which was finally adopted, that part of the population which had at the outset of the Rebellion in 1641 been in the possession of about two-thirds of the lands in Ireland, found themselves in 1665 in possession but of one-third; after a long period of turmoil and confusion, in which the right and title to lands was tossed about as on a sea of blood; far more turbulent and terrible than that peaceful forensic sea on which Bacon says inheritances in England were tossed for some years after the passing of the Statute of Uses.

But the uncertainty arising from these successive forfeitures, so large, so frequent, had hardly been allayed by the Act of Settlement, when the Revolution of 1688 came. This, as it was the last, was the greatest of all these baneful changes—upwards of a million of acres were confiscated to the crown—the possessions of the Catholics were reduced to somewhere about the seventh part of the kingdom, and the various enactments were passed to which we have already briefly alluded, and which at once prevented any extension of this proportion, being in point of fact evidently intended to exclude that class of proprietors altogether. Since that period Ireland has been at least relieved from any recurrence of this cause of contention. No great forfeitures have since the Revolution unsettled rights to land. But as we shall see, another element of discord, peculiar to Ireland, sprung into existence about that time, or at any rate at that time first came into notice, which has proved little less rife of political and social evils—the tenant right and the tenure of leaseholds renewable in perpetuity.

The case then is this: all individual rights to lands in Ireland were in fact settled in the reign of William III. For our purposes the last great settlement is the only one that need be regarded at all. If however we cast our eyes farther back we shall see at every stage confusion upon confusion—the Ulster plantation being the only scheme that stands steadily and consistently forward, like some old Dorian phalanx emerging on a broken field of battle from the wreck of its barbarian allies. After that settlement we see a line of policy for many years persevered in which must needs estrange the affections and excite the worst passions of the large mass of the population. Can we be surprised that at the present day disturbances still continue? Do we expect that England in the reign of John should display the features of an unbroken tranquillity? What England was then, Ireland is now. A period of a century and

a half had then elapsed since the Norman invasion; nor is it unreasonable to compare that event with the Revolution in Ireland of 1688. William of Normandy left more resources to the remnant that he spared of his Saxon foemen than William of Orange found it safe or possible, from the state of factions, to leave in the hands of his bitter Celtic foe. The curfew bell, and all the train of Norman ordinances, were no whit more bitter than the statutes of William and Mary, and of Anne. If no Saxon rose to any place of eminence till the time of Henry II.,¹ such exclusion was by no means so rigorous as that which altogether debarred the majority of the Irish from the church, the bar, or any employment under the state. If the state of England was then disturbed, the last century saw two invasions of this island, and a most dangerous insurrection, abetted by foreign aid, in Ireland: enough to keep up the hopes and passions of the disaffected. And if modern governments have superior advantages in their police and regular armies, to reduce insurrection: on the other hand, they are prevented by the force of public opinion from the same unrestrained use of these more extensive means, or from striking the crushing blow, which medieval monarchs delivered with their less shackled physical aids. We repeat that the two periods may very fairly be compared. The reign of Richard I. had been, like the last age, a period of concession and conciliation—may the ensuing period display the same union between Celt and Saxon that in the sequel of the thirteenth century and since, has been displayed between Saxon and Norman!

Had we then been left from our knowledge of the past history of Ireland to guess at her present condition, had we known nothing of her actual state for the last generation, we should not have been led to anticipate tranquillity. We find that no very long period has elapsed (not long, in the life of a nation),—about one hundred and fifty years,—since the possession even of its soil was settled; that the possession was then settled in a race of strangers hostile, by recent strife and traditional prejudices, to the majority of the native inhabitants; that that majority were, by the aid of the arms and wealth then wrested from them, bowed down to the earth; still however dangerous by their sufferings and their numbers, and still retaining the consciousness of

¹ Thomas à Becket was of Saxon parentage, and the first of that race who rose to any place of power. His father is celebrated in ballads: his adventures in Constantinople, as there detailed, seem to have formed the basis of those attributed to the now more eminent "Lord Bateman," whom Cruikshank's illustrations have probably rendered familiar to our readers. See Thierry, *Conq. des Norm.* i., App. 3.

their power; and possessed also of a municipal, and, to a certain extent, of political freedom. We also find that the interval which has elapsed since the last settlement of possession has witnessed a series of political and social revolutions, as deep and universal as ever before found place upon the theatre of the world. And here too the parallel which we have attempted to draw between the state of England in the twelfth century and Ireland in the eighteenth. The crusades which occurred in the former period are almost the only phenomena which, for the moral or political changes to which they gave rise, can be compared to the French Revolution. It is apparent that the only circumstances which could have preserved tranquillity in Ireland, would have been the presence of a virtuous, economical and farsighted body of landowners, and a most carefully selected system of tenures, which might in some measure reconcile the necessity of the case with the legal requirements concerning the possession of land. It is hardly necessary to state that such a combination of circumstances has not been found. As to the first essential: the Irish landlords are absentees as a class; but who will say that their absence has in any degree diminished the sum total of prudence, of foresight or of economy in Ireland? And as to the second essential: as if in order that every element of confusion should find a place in that unhappy country, a system of tenures has been firmly established, not only in the customs but in the prejudices and affections of that unhappy people, too well calculated to perpetuate discord, and especially agrarian discord.

The chief sources of evil in that system are the neverfailing presence of the "middleman," and the excessive prevalence of renewable leaseholds. Both these are of ancient date in English practice also; but here they are very different in their nature, in their prevalence, and in their consequences, from those in Ireland. The practice of making subleases is of course common enough in England; and as to renewable leaseholds, whether for years or lives, we shall presently show that it is by no means improbable the tenure was imported into Ireland from hence. But it is in the subleases of subleases, three, four and five deep, in the exorbitant advance of rent demanded by each successive sublessor, and in the prevalence of the custom in agricultural districts, that the great difference is to be found between English and Irish subleases; and renewable leaseholds have been made mischievous by a peculiarly Irish "equity," which has been held to attach to them, and which, after being *de facto* established by long practice and consent, has long since been recognized by statute. And besides these differences

in the practical application of forms well known here, it must be apparent from the review just taken of the history of the state of rights to land, that tenures highly mischievous in Ireland might be innocent enough in England.

Renewable leaseholds may be either for years or for lives. The particular Irish tenure to which we now refer is that of leaseholds for lives, renewable in perpetuity; in which the owner of the fee covenants that whenever one of the lives mentioned in the lease expires, he will allow a fresh life to be inserted in the lease on the payment of a fixed fine. This covenant will, it is now well established, be enforced against the lessor where it clearly appears that he has bound himself to renew *in perpetuum*, though it was once denied that it was competent for the parties to enter into such a covenant.¹ But if that was at any time the law here, it never was in Ireland; where this sort of interest has found great favour in the eyes both of the people and of the judicature. As far as above laid down, however, the law in both countries is identical, and the very same construction will be put on any lease or agreement, as to whether it amounts to an undertaking to renew from time to time for ever, or only to renew for one or more. But a very considerable difference has been introduced in the laxity with which a forfeiture on the part of the lessee is enforced in Irish courts, as compared with English courts, a laxity which received the sanction of the legislature in the declarations contained in the Tenantry Act.

Leases of this description in both countries are, generally speaking, highly favourable to the lessee: in leases of old standing, by reason of the diminished value of money and the increased resources of agriculture since the date of the lease: in all, whether of old or recent date, by reason of the views of the parties in granting them, which in many instances are principally directed to the raising of large sums in gross by way of premiums or fines for renewal. It is, therefore, evidently for the benefit of the landlord to take advantage of any breach on the part of the lessee of his part of the contract, and to insist upon regaining possession of the lands in case of neglect in paying the stipulated fines, or to obtain renewal of his lease from time to time as the lives named drop in succession. It is the duty of the tenant to obtain such renewal, because, in the first place, it is his interest, and the landlord cannot be expected to take care of that; and in the next place, the lives named are generally of the family of the lessee and strangers to the lessor, who cannot be taken to be cognizant of their existence or decease. And each life ought to be renewed with the least

¹ See Bac. Abr. Leases (U).

reasonable delay, because the life intended to be inserted may be of very short duration, and then a fresh renewal and fine would accrue, which the landlord runs the risk of losing if the first renewal be deferred. Moreover, the preservation and continuance of the tenure must be taken to be one of the primary objects of the parties in preferring a lease of this description to a rent in fee farm (which indeed they could not properly create since the stat. *Quia Emptores*; see Butl. note to Co. Lit. 143 b), or to a conveyance of the lands, reserving a rent-charge of the same amount. The remedy for a rent-charge was of old either by distraint or writ of annuity. To these has been added the action of debt; but it is obvious that none of these affords so full and complete a remedy as ejectment, which the lessor of a renewable leasehold might bring on nonpayment of his rent, and recover the land itself, and put an end to the lease. The difference to the lessor is very substantial, and not one of words merely, or of the form of remedy; and this very valuable incident must in justice be preserved from being destroyed by the act of the tenant. And as by lapse of time the presumption of a rent-charge would arise against the lessor if care were not taken to preserve evidence of the continuance of the tenure by the renewals from time to time, it must be an act of forfeiture in the lessee to neglect renewing his lease upon every necessary occasion, *i. e.*, upon the decease of every *cestui que vie*. Still more forcible is the claim of the landlord to the benefit of a forfeiture when all the lives have been allowed to run out without any renewal. And in England the lease would unquestionably be in each of these cases forfeited; and this, not only on the ground of implied fraudulent concealment on the part of the lessee, but from the necessity of the case. Owing to the uncertain duration of human life, no compensation can be made; the amount of fines lost to the landlord by the neglect to renew as each life drops cannot be calculated; (it appears that no forfeiture would be incurred were the tenure on a lease for years renewable for ever at certain times—every seven years, *e. g.*—See 14 Ves. 57, 68). But in Ireland what is called the *old equity of the country* interferes to preserve the rights of the tenant, if they have been lost by mere neglect. It was considered that the intention of the original parties to the lease was the preservation of the tenure and the regular payment of the fines and annual rents, and that subject to this, the lessor was in effect to part with the whole possession of the land for ever, just as much as if he had sold the land in fee; that the consideration for this consisted partly of the present premium, which he had received; partly of the annual rents, which were paid; and in

part also of the renewal fines which might from time to time accrue: that if it could be discovered what would be the sum total of these renewal fines, recurring at uncertain intervals, but generally of small amount—seldom exceeding half a year's rent, often merely nominal, as a peppercorn—it would much more nearly carry out the original contract to decree the possession to the lessee upon payment of such compensation, than to allow the lessee to be ousted, and the landlord to take possession on account of neglect in paying him what was in fact only a small part of the price; and that as to the preservation of the tenure, *that* would be sufficiently preserved by being now acknowledged *de novo*. The only difficulty in this view of the case was how to ascertain the amount of compensation, and it certainly appeared no easy matter to calculate the sum total of fines which might have accrued during a period of neglect of twenty or thirty years, with interest on such fines from the time they became due. Chief Baron Gilbert in this difficulty, presiding in the Exchequer in Ireland, hit upon the expedient of septennial fines. By analogy to the period limited in several statutes, that after seven years from the time when a man is last heard of he shall be presumed to be dead, that judge introduced the regulation that a fine should be deemed to accrue due every seven years, and interest computed accordingly, and this rule was universally approved of and adopted. Accordingly no case of mere neglect or lapse of time, without any evidence of fraud on the part of the tenant, was then held to be sufficient of itself to cause a forfeiture. But about the year 1777 there was a case of *Bateman v. Murray*, in which this old equity had been insisted on successfully in the Irish Chancery, and in which, when it came on appeal to the English House of Lords before Lord Thurlow in 1779, the judgment below was reversed. The reversal took place on grounds which entirely precluded the old equity from being insisted upon, for it was a case of gross fraud on the part of the lessee. In the words of Lord Redesdale (*Fitzsimon v. Burton*, *Finlay on Leases*, p. 97), "The man who had the benefit of the lease was the agent of the family to whom the reversion belonged; he was continually calling on all the other tenants, his underlessees, to renew their leases, but he took care not to call upon himself to renew his own lease; that was a circumstance furnishing in my mind a sufficient ground for reversing Lord Lifford's decree." It was, therefore, a case of gross fraud, and no intention could be argued in the English House of Lords to deny or overrule the old equity in question, because they refused to admit of its application to such a case as this. However, the agitation among Irish lawyers was ex-

treme, and it was thought necessary to guard against any conclusions which might be drawn from the case of *Bateman v. Murray* unfavourable to the old established rule, by the declarations contained in the Tenantry Act, 19 & 20 Geo. III. c. 30.

This act, after a preamble reciting that great part of the lands in the kingdom were held under leases of this nature—that such interests had always been considered as perpetuities, and that the received opinion, countenanced by judicial decisions, had been that courts of equity would relieve against mere neglect to renew, or lapse of time, where there was no fraud in the lessee, upon due compensation to the landlord for such neglect—proceeds to declare, that, upon an adequate compensation, courts of equity shall relieve tenants and their assigns against mere lapse of time, if no fraud be proved against the tenant or his assigns, unless it be proved that the lessor made demand of the fines, which was not complied with within a reasonable time (s. 1); and in the second section enacts, that if there should be any difficulty in discovering the lessee, a demand of the fines from the principal occupier and two months' notice in the Gazette shall be considered a sufficient demand within the act.

This act, it will be observed, is declaratory merely in the first section. The only part, properly speaking enactory, is in the second section, where it provides for the service of notices by landlords on tenants whose place of abode is unknown. And it is remarkable that the case of *Bateman v. Murray*, which gave occasion to its introduction, would receive the same decision after as before the statute.

Although this old equity was, in point of fact, already so firmly established by judicial precedents as neither to require or receive any additional or extended validity from the declarations in this statute, yet it was not to be expected that a measure expressive of a sentence of approval by the legislature, of a doctrine so hostile to the interests of the landlords, should pass without a violent struggle; and it seems impossible not to grant the palm of superior force to the arguments of the opponents of the "equity," if the matter had not been so hedged in and covered by authority as to render all argument useless and out of place. It is impossible, if the tenure be retained, that this doctrine, one of the striking features in the development of it in Ireland, should be omitted, unless by an act of parliament, which should impress a wide difference between the renewable leases that are to come into existence and those that already exist. Twenty-one lords have left on record their protest against the act, which is, in fact, a protest against the continuation of the equity, the principal parts of which we shall here transcribe,

as they put forward, in brief and clear terms, the chief arguments against the principle sanctioned by the act.

“Dissentient.

“For the act discharges one of the contracting parties from the literal obligations of his covenants and leaves them binding on the other.

“For it relieves the lessee against lapse of time if no circumstance of fraud be proved against such lessee, but does not say whether concealment of the termination of one or more lives be fraud within this act.

“For the lessee names the lives, and probably of persons unknown to the lessor, and therefore ought to be obliged by this bill to discover the death of each life to the lessor and the time when it happened, which is not the case.

“For it is an *ex post facto* act, construing the intentions of the parties differently from the evident meaning of the covenants.”

Owing to the ingredient of fraud already mentioned appearing in *Bateman v. Murray*, that case would have received the same determination after as before the Tenantry Act. This act therefore by no means ran counter to Lord Thurlow's judgment, although many writers on the subject point out the guarded language used, and expressly state that this was from delicacy to Lord Thurlow, whose judgment was thus overruled by the declaration of the legislature. But though, on the one hand, this is not the case; and although, on the other hand, the act appears to set up and finally recognize the old equity of the kingdom; yet, in fact, it does contradict some dicta which fell from Lord Thurlow in moving the judgment of the House in *Bateman v. Murray*; and does also, to some extent, modify and control the old equity, or at least the cases in which it can be relied upon. No one can fail to recognize in the declarations of the act the direct denial of the following expressions in Lord Thurlow's reported address:—“The lessee has neglected to do that which he ought to have done. How is equity to interfere? * * * I take the rule to be this: courts of equity will relieve the lessee if he has lost his right by fraud in the lessor, or by an accident on his own part, *but will never assist him where he has lost his right through his own gross laches and neglect.*” “But it has been argued that if the lessee has not abandoned his right he ought to be let into his renewal; that here the value of the land is far beyond the value of the fines, and that he therefore cannot be presumed to have intended to forfeit his right; that he has never given any cause for such conjecture. * * * But I take the rule to be this: *that when the lessee has lost his legal right he must prove some fraud on the part of the lessor by which he*

was debarred the exercise of that right, or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying at the stated times for a renewal according to the terms of his lease." (Bateman v. Murray, Finlay, p. 85.) The whole of this extract, which in fact contains the full English doctrine on the subject, is directly contradicted by the language of the first section of the Tenantry Act above quoted. It is there expressly stated that *judicial opinions* have countenanced *the received opinion* that courts of equity will relieve against mere lapse of time, where there is no fraud in the lessee; not where there is fraud in the lessor. And, notwithstanding the language of the lord's protest (quoted *supra*), it seems pretty clear that concealment of the dropping of the lives is not fraud within the act. Fraud, indeed, strictly speaking, laches or neglect, however gross, cannot be; although it may form such strong evidence of fraud as a court of equity will act upon, in the absence of counter evidence. And, on the other hand, a very valuable modification on the old equity has been introduced by that provision of the act which enables landlords to put an end to protracted neglect on the part of the tenant, and, by demand of the fines, to regain possession in case of non-compliance within a reasonable time. It is true it is still left unascertained what such reasonable time may be, but that is in the discretion of the judge to determine under the circumstances of each case. And in one case (Jackson v. Sanders, Finlay, p. 227) renewal was refused when the fines had been demanded, and remained unpaid for the space of five months after the demand; and from some of the expressions of Lord Eldon, in the report of that case, it would appear that four, three, or even two months might, under special circumstances, be deemed such an unreasonable delay as to induce a refusal of relief.

As to the period when, and the part of the kingdom where, this tenure, now prevalent in every part of Ireland, was first introduced, authorities are exceedingly divided. Some have put forward the notion that it was introduced by the second Duke of Ormond (son of the Great Duke), in order by the fines to raise money to pay his debts; and, in effect, that nobleman's influence enabled him to obtain a private act of parliament, in the year 8 & 9 Will. III. (A. D. 1697), empowering him to make such leases of his settled estates in certain counties in Ireland for that express purpose. But many of the litigated cases in the books arose upon leases of much earlier date. In Boyle v. Lysaght, for instance, the original lease was dated 1660; in Lord Rosse v. Worsop, the lease was dated 1682; and in Burnett v. Lord Inchiquin, 1668. And, accordingly, some attribute only the

great prevalence of such leases to the practice and introduction of them by the duke; and allege that they were first introduced in the time of the Great Rebellion, when they were employed to screen the property of Catholics from forfeiture, in the same manner as the invention of uses in England was much resorted to in the wars of the houses of York and Lancaster, to evade the frequent forfeitures which followed the alternate successes of either party. Without allowing much weight to the authorities which insist upon this origin, we may remark, that at least it shows that such leases were in those days generally in the hands of the Catholic population; since no such origin could be reasonably assigned to them unless they were then tolerably prevalent (the motive would cause a very general adoption), nor unless the Protestant lessees of this description were few in number; for if these leases were as generally made in favour of Protestants as of Catholics, it is clear the motive assigned would never have suggested itself. In fact there was then no ground for such a motive; for Catholics were not in any manner disabled from holding lands until the reigns of William and of Anne. We are compelled, therefore, to seek some other origin; but we may notice this circumstance, as it corroborates the hypothesis we shall presently put forward. Lord Redesdale, in discussing the origin of these leases, assigns no time in particular to their introduction; but says that they became general in this way:—"Persons," says his lordship, "purchased improveable estates; but, having no money to carry on the improvements, procured it in this way. They paid 15,000*l.*, for example, for an estate, and conveyed it to another, in fee simple, for 10,000*l.*; taking back a lease of the whole, with covenant for perpetual renewal, at a rent equal to the interest on the 10,000*l.*" Per Lord Redesdale, in *Magrane v. Archbold*, 1 Dow. P. C. 109. This account is not very satisfactory as an origin of the practice; it seems to presuppose established titles, and the presence of capitalists ready to advance money on the security of land; whereas neither of these existed in Ireland; and the latter do not exist to the present day. The exact contrary of Lord Redesdale's supposition did, we suspect, in general take place. It was indeed the owner of the fee who wanted ready money; but he wanted it not in order to lay it out in improvements on the land; nor did he feel any inclination to part with the ownership of the fee, the sovereignty, as it were, of the land, and accept instead a mere leasehold tenure, although renewable in perpetuity. Instead of a sale of the fee and taking back a renewable lease, we suspect that the landowner did in general retain the fee and grant a renewable lease, taking the premium

for his own immediate purposes. It is very possible that there were frequent instances of transactions of the nature of those mentioned by Lord Redesdale; but such an employment of this mode of leasing seems to point to it as already established.

Mr. Hamilton Smythe, in the chapter he has devoted to the consideration of leases of this description, follows Mr. Lyne and other authorities in attributing their introduction to the time of the great Ulster plantation (circ. 1610), but we think that their first introduction seems referable to a much earlier period. It will be recollected that we have already mentioned how the forfeitures which ensued to the crown upon the suppression of the rebellions of the Earls of Desmond in 1583, and the Earl of Kildare shortly after, were with heedless extravagances granted away in vast tracts to the favourites of Elizabeth or their followers;¹ and it was at the same time noticed, that the consequences of those forfeitures were at the time rendered less bitter to the natives by the fact of the greater part of the lands being regranted to the original possessors *upon a permanent tenure*.² This was particularly the case in regard to the forfeitures we have mentioned of the countries of the septa who followed the Earl of Desmond in his revolt in Cork and Kerry, and the Earl of Kildare, in the midland counties of Meath and Longford. This permanent tenure was in all probability the tenure in question. In fact, it seems perfectly allowable to carry back the antiquity of the practice to the times of very early forfeitures, which were in all cases previous to the settlement of Ulster under James I. granted away by the crown to powerful subjects in large tracts, which immediately raised the grantee to the position, as far as extent of territory was concerned, of a feudal baron of the first class. And when the stat. *Quia emptores*, which early obtained authority in Ireland, prevented the continuance of the practice of sub-infeudation, there seems every probability that this tenure should be received with great favour. Its introduction was a matter of no difficulty; for it was already well known in England. It flattered the sense of supremacy in the lord of the fee, by reserving to him a reversion and seignory which was something more than a mere name, and to which were attached not only the important part of the services which a sub-infeudation would have secured, but substantial benefits in the shape of rents and fines, and a continual acknowledgment of the seignory of the lord on every occasion of a renewal. In fact, the analogy between leases of this description and lands holden of mesne lords by charter, and still

¹ The poet Spenser obtained upwards of 40,000 acres in the county of Cork on the Earl of Desmond's rebellion.

² See 3 Hallam's Const. Hist. pp. 504, 507.

more nearly in those held at will, the modern copyholds, has not escaped Lord Redesdale, who distinguishes between them in his judgment in *Calvert v. Gason*, 2 Schoales & Lefroy, 561. And the original owner, ousted by force of arms, was too happy to receive back his paternal fields for an estate of no less duration than that of which he had been deprived, and that on very mild conditions: in many instances the rent and fines reserved do not altogether amount to a tenth part of the value of the land; and he could not but perceive that he gained great additional security against any future forfeiture. It was thus, unfortunately calculated to please all parties: the landlord obtained an immediate sum in gross, and (since in many instances the grants to him were very large) secured a princely revenue, while he retained all his territorial influence and privileges. The regular payment of the rents was thus insured to the landlord in the best possible way, since he might enter upon the lands of the defaulting tenant just as if he were a mere tenant at will. And the landlord was also seduced to grant leases of this description rather than any other, by the specious argument that they tended to introduce improving tenants in consequence of the enduring interest which was thus granted in the soil, sufficient to encourage them to lay out securely both skill and capital in increasing the produce of their lands: forgetting or not perceiving, that although a certain duration of interest is necessary for the encouragement of an improving tenant, yet that it does not necessarily make every tenant an improver. Fixity of tenure can give a cultivator neither skill, nor capital, nor perseverance, nor honesty; yet there are many instances where landlords, satisfied that they have done their part by granting leases for lengthened periods, use no other test in deciding on the choice of a tenant than the amount of rent they offer; and in this manner the very skill and honesty of a man may prevent him from obtaining a lease. Skilful enough to know that the land cannot afford more than 40s. an acre, he is too honest to offer 80s.: but his competitors are not so scrupulous. In Ireland the possession of land is life, the non-possession, starvation. There are no manufacturers to offer occupation to a redundant population; no mines, no fisheries. If a man has no interest in land, he has nothing.¹ A more clamorous or unscrupulous bidder does offer 80s., and the extended term for which he obtains possession only tends to keep improving tenants off the land. Such a Nemesis seems to brood over every measure introduced into Ireland. Whatever there is of evil seems to extend and flourish; whatever there is of good becomes neutralized, or

¹ An exception must be made of the province of Ulster.

even perverted into a means of enhancing the evil. Are severe measures resorted to? They alienate affection without over-awing crime; they multiply duplicity, but fail in enforcing obedience. Lenity, unsuccessful in conciliating good will, stimulates the mob to ideas of the most preposterous arrogance: a straightforward rule is eluded, a reserved policy is menaced and held up to odium. Sad facts, but scarcely instructive; since the accumulated experience of centuries seems but to bring to light accumulated difficulties, without approaching to a solution; and the age is past in which this Gordian knot might have been cut. No more coercion bills for Ireland! Still less any recourse to measures constitutional and common enough under the reign of Elizabeth.

Whatever was the origin of this tenure in Ireland, and to whomsoever due, there is no doubt that it has been productive of many evils, enhanced in no ordinary degree by the mischievous system of underletting. It has been said by Lord Redesdale, that as much as one-seventh of the whole land in Ireland is held on these leases; that in each case there are sub-leases, three, four, or five deep; and that every lease of this description gives rise to at least one suit in chancery or action at law on the average in every ten years. Continual litigation of titles! But if the legal measures this practice gives rise to are bad, the illegal measures are much worse. In consequence of the prevalent notions concerning the extent of the "old equity," every proprietor of a lease imagines that he has an indefeasible interest in the land; forgetting that certain acts are necessary to perpetuate his own interest; and still more apt to forget, if an under lessee, that the perpetuation of his interest depends, not only on the performance of certain acts by himself, but on the part also of his immediate lessor. If the first lessee, for instance, neglects to renew and pay his fines on demand, or is guilty of any fraud within the Tenantry Act, not only he himself, but all his sub-lessees are ousted by the entry of the original lessor or his representatives. If the lands, as is usually the case, have been sub-let three and four deep, the actual occupiers of the soil may amount to hundreds, each of whom deems his possession secure and perpetual. It is easy to perceive the fruitful source of agrarian outrage thus opened. The midnight attack, the scenes of violence and crime, are in many instances prompted by the mistaken idea of a just retribution for an unauthorised usurpation of indubitable rights. And thus also may be explained many of those stories which astonish English auditors accustomed to pedigrees of moderate length, at least in the lower classes, and having moderate ideas

also as to the proper period for the limitation of actions. We are told of an old beggarman who day after day returns to take up a position in front of Castle Callaghan, recently purchased by Mr. Brown of Liverpool. Wondering at the pertinacity of the visitor, the owner accosted him. "You come here pretty often. You seem to like this place." "I do," says the seeming beggar; "it 'ud be mine this day if all men had their rights." Allah Akbar! thinks the Saxon—God is great—what pedigrees these Irish have! And he thinks he has before him a lineal descendant of some chief in Erris,

"When Malachi wore the collar of gold
Which he won from the proud invader,"

and he wonders at the mutability of human things, and the pride of ancestry, which makes the descendant of kings disdain to toil like a slave where his fathers ruled, and many other great and deep thoughts are in his mind. But this is all poetry: the man does not know whether he had a great grandfather; but he means that the land was his for ever once, and would be so still, but that *he neglected to pay his rent and fines*—or but that, for no fault of his, perhaps, the head landlord came in and turned them all out—him and his neighbours. And so there are many other equally ragged gentlemen, equally attached to other parts of the domain of Castle Callaghan; and Mr. Brown thinks himself lucky when the three shots fired at him next night only take effect on his horse and his hat. He leaves Ireland the day after, and next week an agent comes down, who can stand fire; and there is one more middleman in Ireland than there was on the day when Mr. Brown first spoke to the beggarman.

We have entered at some length into the nature and consequences of the renewable leaseholds in Ireland, because the mischiefs arising from them do not appear to us to be sufficiently estimated. It is asked, how can that tenure be so mischievous in Ireland?—how can disturbances and murder be attributed to it there, when in England it is so innocent? In the first place, we answer that it is not nearly so frequent here as in Ireland, and that it very obviously may be productive of greater evils there, multiplied as it is by the practice of subletting, especially taking into consideration the generally disturbed state of the agricultural parts of the country from other causes,—religious and repeal agitations for instance, and the pauperised condition of the population. We do not attribute to this tenure, or to the practice of underletting, solely, all the disturbances in Ireland. The law of real property is not the only

subject in which error can be ascribed to the policy or conduct of the legislature. And besides, the peculiar Irish equity entirely alters the tenure. To a lessee not guilty of fraud, these leases present an absolutely indefeasible perpetuity, just as much as a fee-simple. No neglect or laches on his part,—no lapse of time can deprive him of the right to obtain the assistance of a court of equity to renew and confirm his estate. And accordingly we find the lessee generally considers himself as the owner of the land, in which, in point of fact, he certainly has a larger interest than his lessor. But the lessor has the higher interest, and he too considers himself the owner of the land, and strictly speaking he is so. He will triumphantly point out that it is not a dry, unprofitable reversion or seignory that remains in him, with little but the honour, like the lordship of a manor,—that the annual rent payable to him is not on the other hand a mere rent-charge, for which he may indeed distrain when in arrear, but which gives him no property in the land itself; and while he points out the injustice of the old “equity,” he shows you at the same time that fraud at least will deprive his tenant of that plank, and that instances of fraud are not so unfrequent as to render his chance of the benefit of a forfeiture valueless. The lessee and all his underlessees in the meantime do not suffer themselves to be disturbed by these speculations while enjoying the substantial benefits of the land; but it is no small evil that five or six persons may thus be possessed of what they deem indefeasible rights to the perpetual enjoyment of a single field, rights which do not easily admit of an adjustment, and which may so soon be scattered to the winds by acts or neglects over which the greater part of the claimants have no control.

It will readily be seen, especially from what has just been advanced, that the mischievous tendency of leases of this description is aggravated, and the opportunities of mischief multiplied, by the well-known practice of subletting. This practice, innocent enough in itself, even necessary in a vast number of instances, is an example of the fatality we have just noticed, as brooding over every measure and practice connected with Ireland. In many instances,—mining adventures, building leases, and the like,—it is a very useful practice; but not in lands destined to the purposes of agriculture. In the first class of cases, the first adventurer has only skill and capital sufficient to do the first rough work; and it is necessary to call in the aid of others deriving an interest under him to complete the details which may render the whole profitable. But this is not the case in agriculture. There the same skill and capital can carry out all the operations necessary for deriving the utmost advantage

from that science. Middlemen, therefore, though they may be justly allowed in some instances, are useless when they appear in this branch of industry. And, as has been elsewhere observed, agriculture,—under which term we would include all means of producing food from fields, whether by pasturage or tillage,—is the main employment of the Irish labouring classes. But if it be allowed to be expedient to have an intermediate class, it by no means follows that it is expedient to have three or four interposed. Such a multiplication is worse than useless. It is mischievous, were it only for the reason that it increases beyond what is just the proportion of the idle to the industrious classes. It is useful and proper in every community, above the first stage of society, to have a small class maintained in idleness by the labour of the multitude. But there are limits which must be narrowly watched, and beyond which the proportion of these two classes must not be carried. It may be difficult *à priori* to point out the line of demarcation, or to ascertain it theoretically; practically, every transgression of that line makes itself instantly felt; and it will be readily conceded that this line has been transgressed in Ireland. The immediate consequence is a double evil; the productive classes are diminished, and an increased unhealthy burthen is laid upon the part that remains. The productive class is diminished from ten to nine; and instead of one individual, two must be supported in idleness. Thus nine men have to support two, instead of ten men maintaining one. It is obvious that the latter may be a useful task; the other an intolerable burthen.

The evils arising from the multiplied subtenancies have often attracted attention. Indignant orators have held up Irish middlemen to national hatred and contempt; none have been louder in their strain than the Irish themselves; but the evil still continues. The imperial legislature has endeavoured once and again to bring a remedy; but the evil still remains. In social diseases, as in diseases of the mind, the patient must minister to himself. It is of the very essence of a right of property in land, to have over it a power of alienation for the whole or any less interest. Restraints upon alienation are contrary alike to the requirements of reason and of commerce; and they are accordingly *odious* to the English law, which seeks every opportunity of evading them where they are annexed to an estate either by implication or by express words. It was through the favour with which they regarded alienation that the judges were led to make the decision in Taltarum's case,—it was on this ground, that general provisions against alienation annexed to freehold estates

are held to be void ; and to mention no other examples, on this ground stands the well-known rule, that even in leases for years, if there be a clause against any alienation without consent of the lessor on pain of forfeiture, yet if such consent be once generally given, the forfeiture is held to be for ever waived ; and if advantage of the forfeiture be not immediately taken by the lessor, it will be equally held to be waived. This doctrine was of course *ex animo æquo* transplanted from our courts into the Irish. But there it was speedily found that some modification of it was necessary. Both lessors and courts of justice perceived that it was calculated to shelter and propagate mischiefs at work there, which in this country never came into existence,—that it increased the facilities for subletting, by removing the impediments which landlords sometimes endeavoured to create ; for if they neglected or were unwilling to take advantage of any forfeiture under such a clause, it became waived by implication of the law. This implication could only be prevented by act of parliament ; and accordingly the Subletting Act of 1826 was passed, which not only expressly provided against any presumption of waiver, arising from neglect to take advantage of a forfeiture, or particular licence to alien, but even enacted that it should not be lawful for the lessee to sublet, or even devise to more persons than one, and that although the lease contained no clause or stipulation against alienation. The act became very unpopular, and it was particularly objected that the last-mentioned provision was an unnecessary interference with the arrangements between the parties, who, if they objected to unlicensed alienation, might introduce a clause to that effect in the lease. Accordingly in 1832, the second Subletting Act, the one now in force, was passed, which repealed the first, and in general re-enacted it, with the exception of these objectionable provisions.

The renewable leasehold tenure extends only, it is said, over a seventh of the country ; and the mischiefs to which it gives birth are of course confined to that, although multiplied by the practice of subletting. But this practice, subletting, extends to lands of every tenure : not confined to one class, it spreads a baneful influence over all. Ireland in the eighteenth and nineteenth centuries may boast, like Germany of the thirteenth and fourteenth, a peculiar class of aristocracy. Germany had her *robber knights* ; Ireland can produce her *squireens*. And the third great source of evil in the present state of real property in Ireland, absenteeism, like the last mentioned, is confined to no particular tenure ; equally indiscriminate and fatal in its

influence, it is only inferior, because it is incapable of that indefinite multiplication which renders the middleman squireen the worst blight of Ireland. You may have, and you continually find, *a middleman upon a middleman*. You cannot have an *absentee upon an absentee*.

Although in our opinion absenteeism is the lesser evil of the two, it is incomparably the more unpopular. The absentee's rent is in fact so many quarters of wheat, or tons of butter or bacon, produced by Irish toil and Irish fields, and taken out of Ireland to be placed carriage-free in London, Paris, Florence or Geneva. This fact is too obvious to escape attention, too simple not to be appreciated by every looker-on who sees the corn grow or the vessels sail: and it lies too ready for introduction into the philippics of demagogues not to be repeatedly, and in the most violent terms, pointed out to every audience.

It is also obvious that every absentee creates at least one middleman. And no doubt the continued drain of agricultural produce, in order to pay an absentee's rent, must render increased efforts and production necessary in order that the capital remaining in the island—whether it consist of corn, cattle, currency or railroads—may suffer no diminution. But many in arguing state the case as if the absentee drained away the gross produce of the land: whereas it is but the rent, i.e. the landlord's ultimate share of the net profit of cultivation which goes, not even the whole gross profit. The absentee does not by his absence diminish the productive class by a single individual; and the drain he occasions, so far as it affects the state, is immediately remediable if wholesome extra exertion on the part of the industrious classes can replace what has been so taken; i.e. can produce articles, whether of luxury or primary utility, of sufficient value in the eyes of the inhabitants of London, Paris, Florence or Geneva, to purchase back the wheat, bacon and butter previously sent to their shores. And there is no doubt that the natural capabilities of Ireland,—the fertility of her fields, the richness of her mines, the productiveness of her fisheries, are so great,—such the facilities both for sea and inland navigation, to say nothing of railways,—that were her inhabitants but imbued with the spirit of industry and independence, *and the same horror of bloodshed* which characterize her Saxon neighbours, she could well repair the drain, though every landowner in the Green Isle were to spend his rent abroad. The drain so complained of is merely a financial evil, which a little exertion would meet and remedy; and the parties making the exertion would be all the better for it. But the middleman is a social evil. Increase the productiveness and resources of Ireland: they are turned to corruption

till you have extinguished this. Like the "juice of cursed hebanon," this ingredient

" ————— doth posset
And curd the thin and wholesome blood."

If, by an energy which the history of the past gives us no ground to expect from the future, the production of Ireland were to be suddenly increased, there would be no corresponding increase in her wealth: the only result would be an accession of a few more thousands to the class of *squireens*. With an increased productiveness, and more *squireens*, she would in effect be in much the same position as she would now occupy, if, with her actual productiveness, her proprietors were to reside on their estates: and she would be little less wretched than before. We do not mean to deny the misery and continual struggles to which absenteeism consigns the people; we only maintain that absenteeism is not the most rancorous and deep-seated plague with which Ireland is afflicted.

It is, fortunately, no part of our duty to point out in what manner it might be possible to remove or obviate the sources of evil which we have endeavoured to describe. We confess that we see at present no prospect of alleviating the condition of Ireland by any alteration in the laws of property, or legislative interference with the prerogatives of ownership. It would be deemed too dictatorial, it might perhaps be found impossible, to pass an act decreeing that the old equity of Ireland, in favour of the holders of renewable leaseholds, should no longer be observed as a rule of law; nor indeed would that remove any part of the mischief from the seventh part of Ireland already held under such leases. It would be wild legislation to decree that the interest of any person in the position of middleman should be made void and cease; or that no rent should be payable to persons not residing within the kingdom.¹ And as to any other measures than those strictly relating to property,—measures of more general policy that may be proposed for ameliorating the condition of the sister kingdom, it forms no part of our present task to form even a surmise as to their nature. There are three steps to be taken towards the removal of any unequal pressure. First, the inconvenience must be pointed out: this the wearer of the shoe generally does with sufficient expedition and distinctness. The causes of the evil should next, if possible, be discovered:

¹ This last rule, we have heard, has been pretty generally and closely followed since the famine commenced, though not established by the authority of parliament; nor has it been observed in the case only of absentee proprietors, but resident landlords have also suffered from its application.

and the discussion of these falls properly within the province of the journalist or pamphleteer ; but the application of a remedy belongs to a higher power. We have accordingly, what lay in our sphere, endeavoured to sketch a few of the leading features in the more recent history of real property in Ireland since the days of Elizabeth ; and Ireland has been so frequently and so deeply convulsed since those days, that earlier events have left no traces on her surface or in her constitution, and have left no result, except that they afford mob orators opportunities of appealing to the passions easily excited, but best left dormant, of a people peculiarly jealous of traditional wrongs. Thus we have passed in review the broad, reiterated forfeitures from the native or naturalized chiefs, granted with a bounty unsparing, improvident and exclusive to English favourites, and regranted by them to the original occupiers, on terms which led the latter to conceive they had in fact regained an indefeasible interest, almost equivalent to the fee which they had just forfeited ;—we have pointed out the uniform selection by each successive government of donees of the Protestant religion, and, ultimately, the disqualification of any save Episcopalians to hold lands at all, save for a short term of years ;—we have seen the prevalence of a mischievous tenure by which several persons are led to claim simultaneous and incompatible rights in the soil, spread and multiplied by frequent sub-leases three, four and five deep ; by means of which the industrious class is always kept at the smallest possible number, and the lowest possible means of subsistence, instead of at the largest possible number, with the greatest possible means of subsistence, which is the only healthy condition of a state ;—and, finally, we have shown the whole system poisoned and plunged in bitter discontent by an extensive and heartless system of absenteeism. Such is the recital of some of the sources of evil which lie beneath the surface of affairs in Ireland. The misery and sufferings upon the surface are terrible enough,—the horrors of an Irish famine and pestilence,—the emulous devastation of starvation, slow and sure, and fiery typhus, now snatching, as if in scorn, a prey from his rival, now piling corpse on corpse, in witness of his prowess, yet sometimes only scorching the victim he intended to consume. Distressing as it is to contemplate these scenes, yet such calamities, and worse than these, have fallen on other nations and passed away. But in that unhappy country the hideous veil of physical suffering and destitution covers, and, in many cases, conceals a moral pestilence more terrible still. National exaggeration of suffering, to stimulate a bounty already pouring out the sources of existence for the relief of a sister's wants,—national ingratitude for a

beneficence unexampled, because impossible, by any other people in any other period,—heartless deceit, and grasping covetousness, and insolence, and impudent lying, such as are disclosed by the Blue Books on the relief works in Ireland, and indeed in speeches which have been made nearer home,—these display a spirit more difficult to allay than the fire-breathing typhus,—a heart more difficult to touch than that of cold starvation. These are the symptoms which strike us with dismay. New crops must, in the order of nature, come at last, and whether this year or the next, famine will pass away, and, as her rolling train disappears, pestilence will give place to health. But the people will remain: and remain the same. The middleman will grind the faces of the poor, and the absentee will from afar off lament the evils which he dares not try to remedy. Riot and murder, depriving capital of its security, will still drive it from the land: and want of capital will diminish employment, and diminished employment will drive desperate men to riot and to murder. With a terrible monotony the fearful circle revolves, and will revolve. Who shall lay his hand upon it, to check it?

B.

ART. V.—WHEN IS A PARTY LIABLE QUA PARTNER FOR A DEBT HE DOES NOT CONTRACT?

THE law on this subject is doubtful and indefinite.

No one can be a partner unless there be a joining of stock or labour and a division of profit and loss, “eo fine, ut quod inde redditus lucri inter singulos pro ratâ dividatur;” see Puffendorf, lib. 5, cap. 8. Where there is in reality no joint interest, there is no partnership, and this doctrine, derived from ancient law, has been confirmed through a long current of cases down to *Rawlinson v. Clarke*, 15 M. & W. 292. In *Smith v. Watson*, 2 B. & C. 401, Best, J., said, “There are many cases where a person may be liable to third persons as a partner and yet not have any interest in the property. Thus, a person who retires from a house of trade and suffers his name to continue in the firm after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons.”

Until latterly it was tolerably well decided that any one who, without having an actual interest in the profits of a concern or being in reality a partner, *allows his name to be used, or agrees that it shall be continued therein as a partner, is liable as*

a partner, although the particular creditor was ignorant at the time of dealing that the name was used.

This rule had no reference to the real transaction and understanding between the parties themselves, but was founded on principles of general policy, to prevent frauds to which creditors would be liable were one person allowed to afford others the means of assuming a false appearance of credit, and on this ground a mere representation of partnership sufficed to render the person so holding himself out liable quâ partner (though not such) for all debts contracted by any member of the firm.

These cases have till lately formed the only ones in which any person could be made liable as a partner, and to neither was there any exception. If a defendant belonged to either class he was liable. The following are all authorities for this position; *Waugh v. Carver*, 2 Hen. Bla. 242, 246; *De Berhom v. Smith*, 1 Esp. 31; *Guidon v. Robson*, 2 Camp. 302; *M'iver v. Humble*, 16 East, 174; *Dolman v. Orchard*, 2 C. & P. 104, &c. &c.

In *Vere v. Ashby*, 10 B. & C. 296, Bayley, J., said,

"The general rule is, that where the partnership name is pledged, any person who is either an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party, to whom the partnership credit is pledged, is privy to an intent to misapply the money. Here there was no ground for imputing any such knowledge to the plaintiffs. If it be true that persons who are actually partners are made liable by a pledge of the partnership name, the only question is, who were partners at the time when the partnership name was pledged? *Ashby, Rowland* and *Shaw* were the persons, though they traded under the firm of *Ashby and Rowland*. *Shaw* was actually a partner in a firm assuming a particular name with his assent."

The liability of persons thus circumstanced had been carried still further by Lord Ellenborough, C. J., in *Swann v. Steele*, 7 East, 210, where he held that a bill received by A. and B. in their business bound C., their secret partner, who was liable to be sued on their indorsement, although he was wholly unknown to the plaintiffs, and was himself quite ignorant of the indorsement. In his judgment Lord Ellenborough, C. J., said,

"There is no doubt that in the absence of all fraud on the part of the indorsee such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are, and yet they are all bound by the acts of any of the partners in the name or firm of the partnership."

As in *Waugh v. Carver*, and in all the leading cases, the liability is just the same where the party charged, being no

partner at the time of the contract, nevertheless holds himself out as such.

This rule of law has been weakened by a recent decision of some importance in the Court of Common Pleas—*Holcroft v. Hoggins*, 2 C. B. 488, where a contract for newspaper articles had been made with another person after the defendant had ceased to be a proprietor, but whilst he remained registered as a proprietor at the Stamp Office. The judgments contain a doctrine entirely irreconcilable with that of the liability of a person who holds himself out as a partner, not really being such. The passages in the judgment pertinent to the question are as follow :

Tindal, C. J. * * * “The question in this case is, whether the defendants were *contractors*, not whether they were interested as proprietors in the newspaper wherein the articles for which the plaintiff seeks to recover were inserted.”

Maule, J., said, “The question, however, to be decided is, whether they contracted with the plaintiff to do the work in respect of which this action is brought. It appeared that *Lonthier*, on the 15th of June, 1844, had taken upon himself the sole ownership of the newspaper in question, and that in that capacity he contracted with the plaintiff; and the jury have found, and, upon the evidence before them, have properly found, that he did so without any authority from the defendants, and that the plaintiff looked to *Lonthier* alone for his remuneration. Proprietorship, therefore, was immaterial. The fact of the defendants being proprietors by no means excludes the possibility of that occurring which the jury found did occur.”

Now in this case no question arose as to actual partnership, for the facts were, that the articles were not supplied until an antecedent partnership between the defendants and the party who made the contract had entirely ceased; but it appeared that not only had the defendants allowed their names to remain at the Stamp Office as registered proprietors of the newspaper for which the articles were supplied, but they had also continued the publication of their names as proprietors in the newspaper itself! A more perfect case of holding oneself out to the world it were difficult to imagine. Equally difficult does it seem to reconcile the judgment given and the terms in which it is expressed with the doctrine laid down in *Waugh v. Carver*, where Eyre, C. J., puts the liability of persons appearing to be partners on the ground of preventing the fraud and loss that would occur if creditors “were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing.”

Now the law is, that where there has not been a distinct notice of dissolution of partnership the liability continues.

Lord Ellenborough, C. J., went the length of holding that notice of the dissolution of a partnership in the Gazette was not sufficient notice to the plaintiff, who was the indorsee of a bill of exchange accepted after such dissolution had taken place, simply because the defendants allowed their names to remain over the shop door. *Williams v. Keats*, 2 Stark. 290.

The law is tersely put in Cowper, 449. "If partners dissolve their partnership they who deal with either, without notice of such dissolution, have a right against both." See also the case of *Brown v. Leonard*, 2 Chit. 120, where the plaintiff actually knew of the dissolution of partnership when he took a note accepted in the name of the firm. Bayley, J., said: "*Brown, notwithstanding the knowledge of the dissolution of the partnership*, knew that Bush's name was to be continued, and that he was therefore responsible, and of course he relied on that responsibility." See also *Dolman v. Orchard*, 2 Car. & Payne, 104, where a retired partner was held liable because he allowed his name to remain over the door.

True it is that in *Holcroft v. Hoggins* the jury found that the contract was made exclusively with one of the proprietors, not being one of the defendants. But this cannot be material, for so it is in most cases made with some other partner than the one charged. So it was in nearly all the cases cited. In *Thompson v. Davenport*, 9 B. & Cr. 78, where the creditor was held entitled to sue an unknown and undisclosed principal, the contract was exclusively made with another party. So it is in all cases of dormant partnership. It is therefore a novelty to find the courts, relying solely on who were the contracting parties in a contract which had sole reference to the concern in which the defendants allowed their names to appear as co-proprietors. According to *Holcroft v. Hoggins*, it is not enough, in order to charge a retired partner with liability for the debts of a firm, that he has held himself out to the world, or even that he has continued in the most public manner to do so. If there were every reason arising on the facts to make the creditor believe that he had the defendant to fall back upon in the event of the insolvency of his partner,—if he invited credit for the firm ever so loudly by the most blatant publication of his continued connexion with the concern,—yet, according to *Holcroft v. Hoggins*, he is not liable at all so long as it can be shown that the act of contracting took place exclusively with the remaining partner after the partnership had ceased, no matter how secretly

this were done! This, with great deference, we submit cannot be upheld.

True it is that after dissolution a retiring partner *may be released* from all liability for subsequent debts; but unless he be a dormant partner he is clearly not released ipso facto. He can alone release himself by *notice* of the dissolution, and by such notice as can be brought home to the personal knowledge of the creditor, especially if he were in the habit of dealing with the firm. There must be evidence, either direct or circumstantial, that he knew of the dissolution when he gave credit to the remaining partners, or the retired partner will be liable; and the onus probandi lies on the defendant. See *Graham v. Hope*, Peake's Rep. 154; *Hart v. Alexander*, 7 C. & P. 746; 2 M. & W. 484. The mere fact that the creditor dealt exclusively with the remaining partner is not the slightest evidence that he knew of the previous retirement of the defendants in *Holcroft v. Hoggins*. On the contrary, there was every presumption that he did not know it, and believed that they were still proprietors, seeing their names announced as such every week in the very newspaper to which the articles were supplied for which the creditor sued. There was, in short, every ground to think that he not only knew of the other proprietors, but that he might reasonably have been influenced in making the bargain by the credit which their names procured to the concern; for if their names had not this influence, why should they be continued on the paper after they had ceased to have anything to do with it?

It may, indeed, be that a creditor may expressly discharge a retired partner from liability, but this must be his own act; and no immunity to the retired partner flows from any absence of authority on his part given to the firm to pledge his credit; for the law pledges it without any express act of the retiring partner, and *implies the authority*, unless he shall have barred it by due notice of retirement. In *Holcroft v. Hoggins*, he kept it alive by allowing the publication of the coproprietorship even after it had actually terminated. How, then, could it matter whether there were express authority or not to make the contract in his behalf? he was responsible quâ partner, or as holding himself out as such, whether he gave authority or not for the contract.

It would appear, from *Holcroft v. Hoggins*, that there must, in all cases of dissolved partnership, be mutuality of contract between the quasi partner and the creditor in order to render the former liable! "The question," says Tindal, C. J., "is

whether the defendant is a contractor, not whether he was interested as proprietor." Nevertheless it were exceedingly difficult to find any case in which a partner could so exclusively pledge his own credit for goods for the firm that the party supplying them should have no power of suing the other members of the firm, unless by special agreement. And assuredly it would be a very singular agreement for a creditor to make, namely, that he would look exclusively for payment to the party least able to pay him. The presumption is, that a creditor, in trusting a firm, does so on the responsibility he knows the law attaches to the most solvent and substantial persons who invite credit by holding themselves out as members of it. *Heath v. Sansom*, 4 B. & Ad. 172, is perhaps the nearest authority for the doctrine in *Hoggins v. Holcroft*; but there the retiring partner was a dormant one and never held himself out to the plaintiff, and on that ground, added to the discontinuance of the partnership when the debt accrued, he was held not liable. That, therefore, affords no support to the non-liability of a partner who has held himself out as one in the most public manner possible.

It is deducible from *Holcroft v. Hoggins*, *if it be good law*, that a mere holding out as a partner, or giving the creditor reason to suppose that the party doing so is responsible, will no longer suffice to make him liable. He must either actually contract himself, or, by the fact of an actual partnership, impliedly give authority to the contract.

There are cases where no partnership has ever existed, but where a party has made himself nevertheless liable by acting and appearing as a partner. The definition of partnership is, as we have stated, the participation of profits and losses. In *Waugh v. Carver* none such existed, and the court held that, though it were no partnership, it had that appearance to the world, and that the liability *quà* partner equally existed. The principle is the same in this case as in that of a retired partner who has given no notice of retirement. But, although no partnership, legally speaking, exists, there usually exists some actual concern in the business or undertaking in behalf of which the debt is contracted in order to render a party to it liable to be sued *quà* partner, who is not really a partner. In *Waugh v. Carver*, two agents were held liable for each other's contracts, who shared the profits of their commissions, though each was to be answerable for his own losses; and in *few cases* has this liability *quà* partner been held to exist unless there were or had been some actual share in the concern possessed by the person charged. Nothing short of this would constitute liability, if he

really had not an interest in the concern, or knowingly allowed his name to be held out.

The interest certainly need not be precisely that amounting to partnership in law; but where no interest exists in the funds of the firm, then neither privity to the bargain, assistance in effecting it, nor co-operation with those who made it, can render any third party liable. Were it otherwise, no one would be safe who heard a contract made and helped to carry it out. *Holcroft v. Hoggins* has increased the jealousy with which the law regards liabilities founded on quasi partnerships. There must be some tangible evidence of actual interest, either past or present, to justify liability simply because a *presumption* of partnership exists. The question is not in such cases *what might the creditor have thought?* but what are the actual facts of the case? Is there an interest as a basis of the presumption or not? and if there be none, did the defendant knowingly allow his name to be used as a partner? *Newsome v. Coles*, 2 Camp. 617.

It may not, in such cases, be safe to rely upon the novel rule, in *Holcroft v. Hoggins*, of who were the parties actually making the contract, and which, wherever there is a question of quasi partnership, has nothing to do with it; but it is essentially necessary to inquire, *first*, whether the defendant was actually and legally a partner when the contract was made, in which case he is clearly liable whether he contracted or not; *secondly*, whether, if not a partner at the time of the contract, he were not one previously, in which case he will be liable unless due notice of his retirement were given, and a discontinuance had taken place of all appearances to the world of his remaining a partner. But he will not be liable if he had been discharged by some express agreement on the part of the creditor. If a dormant partner, unknown to the public, he is not liable at all. *Thirdly*, whether, if not legally a partner, the defendant had some interest in the concern; and, whether he has acted in such a manner as to give the appearance of partnership to the world, and has given rise to that impression and belief, otherwise we submit that he will not be liable. These are, as it appears to us, the safest rules by which these very common but still unsettled points of law may be decided.

ART. VI.—POOR LAW LEGISLATION OF THE SESSION.

THE Poor Laws have had rather more than their usual share of patching this session.

Four or five amendment removal bills have been launched, of which two have struggled into law.

The first and least significant is "An Act to amend the Laws relating to the Removal of Poor Persons from England and Scotland" (cap. 33). This act merely provides, in order to the easier removal from England of paupers settled out of England—

"That it shall be lawful for any guardian, relieving officer, or overseer of any parish or union in England to take and convey before two justices of the peace, without summons or warrant, every poor person who shall become chargeable to any parish in England, and who he may have reason to believe is liable to be removed from England under the 8 & 9 Vict. c. 117; and the justices before whom any such person shall be so brought shall hear and examine and proceed in the same manner in all respects as if such person had been brought before them under and in the manner directed by that act."

Section 2 enacts, that the inspectors of the poor in Scotland are to have like powers under the 8 & 9 Vict. c. 83, s. 77, and are

"To take and convey before the sheriff or any two justices of the peace of the county in which the parish or combination for which such inspector or officer acts, or any portion thereof is situated, without previous complaint or warrant in that behalf, every poor person who shall be in the course of receiving parochial relief in any parish or combination in Scotland, and who he may have reason to believe is liable to be removed from Scotland under the secondly-recited act; and the sheriff or justices before whom any such person shall be so brought shall make such examination, and proceed in the same manner in all respects as if such person had been brought before him or them under and in the manner directed by that act."

This act simply facilitates the above-named statutes for the removal of non-English paupers as to the preliminary formalities.

The next bill to which we must direct attention is that of Mr. Bankes, intituled "A Bill to repeal Part of the First Clause of an Act of the Ninth and Tenth Years of her present Majesty for amending the Laws relating to the Removal of the Poor." It was intended to repeal the provision for five years residence irremovability, enacted by the 9 & 10 Vict. c. 66, which has caused so much excitement and dissatisfaction. The govern-

ment wisely declined to allow further disturbance of the law until next session, when it will be probably wholly remodelled.

Appropos to the 9 & 10 Vict. c. 66, it appears that that act never applied to Wales, according to the following opinion, which we extract from the newspapers :—

“ POOR REMOVAL ACT.

“ A question of very great importance has just been raised upon the Poor Removal Act, namely, whether it extends to Wales. We believe that the magistrates of the principality have hitherto universally accepted it as compulsory upon them. It was certainly a strange oversight in the drawing of the act, already so famous for its manifold blunders.

“ The following opinion upon the question has been given by Mr. J. C. Symons :—

“ *Non-extension of the last Poor Law Removal Act to Wales—
Opinion.*

“ ‘ I am of opinion that this act (9 & 10 Vict. c. 66) does not apply to Wales, and that every order made under its provisions is null and void which affects any parish in the principality.

“ ‘ The 9th section is as follows—“ And be it enacted, that this act shall extend only to England.”

“ ‘ In the previous section (8) reference is made to the 4 & 5 Will. IV. c. 76, as an Act for amending the Poor Laws of England and Wales, which renders it very improbable that no distinction was intended in the 9th section, where the act is limited to England only. Moreover, in the 7 & 8 Vict. c. 101, on the same subject, the limitation clause, section 75, is thus worded—“ This act shall extend only to England and Wales.” Thus where it has been intended to extend an act to Wales, it has been the custom to name it. The word “only” coupled to England in a clause of limitation must, I think, be held to exclude Wales.

“ ‘ There is a section in an old statute passed one hundred years ago, which, at first sight, favours the contrary view. I refer to the 20 Geo. II. c. 42, s. 3, which declares that “in all cases where the kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any act of parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales and town of Berwick-upon-Tweed.” This was an act for levying house-rates, and the section quoted is strangely introduced ; but even admitting it to have a general operation, it obviously applies to the incidental mention of England in statutes intended to include Wales ; and it can have no bearing upon a clause designed to limit the operation of an act. The courts construe statutes according to their literal meaning ; and for these various reasons, I am of opinion that the order for the removal of the pauper may be forthwith made, his removability being nowise affected by the 9 & 10 Vict. c. 66.

(Signed)

“ JELINGER C. SYMONS.

“ ‘ 1, Harcourt Buildings, Temple, June 23, 1847.”

The Attorney-General, in reply to some question put to Mr. Collett on another subject in the House of Commons, remarked, that generally the term England, in statutes, included Wales. So it certainly does when used in any enacting clause, according to the old statute cited by Mr. Symons; but scarcely in a *limitation* clause; or it would follow, that the only possible way of confining an act exclusively to England would be to exclude Wales by an express negative thus, "This Act shall extend to England and *not* to Wales." This would sound strangely. Moreover *exclusio unius est inclusio alterius*. And it would be necessary to extend the express negative to Scotland and the Channel Islands, for in the ordinary meaning of the term, England no more includes Wales than it includes Scotland or the Isle of Man. The constant practice, however, of specifically naming *Wales* with England in all clauses intended to limit the scope of an act to *both countries*, makes its omission in a clause limiting an act "to England *only*" apparently fatal to the presumption that Wales is nevertheless included. If it be so, no paupers in Wales are irremovable to their parishes on the score of residence, and a vast deal of money has been needlessly expended in maintaining them where they are.

The next act on the subject, which has struggled into existence, is that of levying the expenses incurred in the "maintenance, relief or burial" of any pauper rendered irremovable by the 9 & 10 Vict. c. 66, on the *whole union* in which he is chargeable. The object is to relieve individual parishes from an undue burden caused by having a body of paupers charged upon them, whom they are no longer able to remove to their settlements. To these cases the new act is confined. It does not extend to any other charges or class of paupers. It appears to us to be a beneficial provision, but not one of any material importance, except so far as it forms a quasi precedent for the rating of unions instead of parishes, and the commensurate enlargement of settlements, which we think upon the whole advisable. This question will, however, be amply discussed hereafter. Another act just passed is to solve the doubt created by the opinion of the Attorney and Solicitor General, as to the retrospective bearing of the exceptions in the last irremovability act, 9 & 10 Victoria, c. 66. The exceptions are therefore to be made in the computation of the five years alike when they have preceded as when they have followed the passing of the act; as we remarked in a former article, there never was any rational ground for the doubts which it is the object of this act to remove.

A change is to take immediate effect in the administration of

the entire economy of Poor Laws, which we cannot but think highly advisable.

A new board is to be immediately created, comprising the Lord President and Secretaries of State, with one chief commissioner, who is to have a seat in parliament, with two secretaries, one of whom is to be in parliament. The whole of the old staff are to go out of office, and an unlimited number of inspectors are to be appointed, with precisely the same duties and powers as the present assistant commissioners.

It will be a very great benefit thus to render the administrators of this almost necessarily unpopular law thoroughly responsible in parliament. It is to be hoped that the blunders in legislation, and perpetual teasing and mischievous vacillation which have tended to prejudice the people and embarrass parish officers, will cease and determine. The practical administration of laws of which the effect must be to curb the largesses of one of the best feelings of human nature, in deference to the far less popular requirements of physical economy, can never be an office congenial with the sympathies of the English people. It can never be palatable, but it may at least be tolerable in its operation, and systematic in its application. That its hardships have been greatly exaggerated, and its utility to the poor themselves underrated, we are most ready to admit. But the conviction is universal that its administration has been seriously imperfect. There has been a want of uniformity in its execution and an untowardness in its management, which, though far from purposely intended, have materially affected the benefits derivable from a really well matured and evenly administered system of poor laws. We know not to whom the authorship of the various statutes on this vexed and complicated subject has been entrusted, but we earnestly hope that a discreeter choice may be made for the future. The new board cannot but share largely in the direction which the inevitable reforms of the system shall take. May they be circumspect in the very onerous and essential duty of carefully maturing any fresh legislative measures. Much of their credit and utility will depend on this.

The country is anxiously looking forward to the entire abolition of the whole system of removals. We trust that a matured plan will shortly be introduced for this most beneficial purpose—one on the desirability of which opinion is unanimous.

ART. VII.—SPECIAL PLEADING AND SPECIAL PLEADERS.

1. *Letter to the Lord Chancellor on the Reform of the Law.*
By John George Phillimore. Second Edition. London:
Ridgway. 1847.
2. *Thoughts on Law Reform.* By the same.

MR. PHILLIMORE bids fair to become a formidable foe to those cumbrous and exuberant technicalities of Pleading which our greatest judges have denounced and all enlightened lawyers deplore without adequate power of remedying. Great praise is due to this vigorous gladiator for his energy and courage. We are nevertheless disposed to agree with a contemporary that it is meet that he be "counselled as well as commended, in order that he may not do harm to the cause he takes in hand."

The great feature of Mr. Phillimore's pamphlets is hostility to that ancient system of procedure in actions at common law, whose praises have been sung by antiquated sages under the name of *special pleading*, and which the great oracle of English law, in direct opposition to our author, is so far from thinking the greatest evil, that he extols it as among the brightest ornaments of our judicial system,—"*quia bene placitare super omnia placet*," Co. Litt. 17 a—a system which, despite of traducers as violent if not as learned as Mr. Phillimore, has continued to exist to this day the subject of veneration and deliberate regard by the judges of the land, even in cases where, on an objection of a *purely technical nature*, parties are deprived of rights they were otherwise justly entitled to. For, as observed by the Court of Common Pleas in one of the cases quoted by Mr. Phillimore, (Letter, &c. p. 35,) "much as we regret this circumstance, it would be a matter of still greater regret, if, in order to give effect to the supposed justice of this demand, and to remedy this particular mischief, we had done any thing to unsettle the established rules of pleading, and to introduce laxity and uncertainty into this branch of the law." *Jackson v. Galloway*, 3 Com. Bench Rep. 753. Notwithstanding this, it is undeniable that Mr. Phillimore's pamphlets are crowded with cases illustrating most unquestionably his argument that, under the present system of special pleading, great practical injustice is effected. The judges, as in the case just cited, have frequently formally expressed their regret at the judgments they were compelled to give, *from the pleadings not being properly drawn*. From these

inconveniences, however, our author, though he disowns the intention imputed to him of wishing to abolish written pleadings altogether (*Thoughts, &c.* p. 7), stoutly argues for the total demolition of the present system of special pleading.

“That special pleading is the great and prominent evil of our present system, that it makes the clearest right precarious, and the most dishonest pretensions plausible; that so far from bringing the facts really in dispute between the parties to a clear, short, intelligible and satisfactory issue (on which grounds its champions assert the necessity of its continuance), *it is obvious that the purpose of its inventors was to involve the simplest and easiest subjects in the thickest obscurity, and confusion the most hopeless*; these are facts which any one who will take the trouble of turning over a volume of Reports may satisfy himself as incontrovertible. This is the system which drew down the vituperation of Bolingbroke, which edged the sarcasm of Swift, and which bears out the sayings of two men thoroughly conversant with its effects—sayings which, simple as they appear, convey to a reflecting mind as bitter a censure on the law to which they are applied, as it is in the power of man to utter. I mean the one of Lord Loughborough, that no cause was desperate: the other of Lord Abinger, which he first stated at the Bar, and afterwards repeated on the Bench, that he had never known any case decided on every point from beginning to end on its merits. This system it is that Mr. Brougham denounced, and Lord Brougham did not sacrifice his power to destroy; *this system it is which the judges might have destroyed, but chose rather to contract and fortify*; this system it is, the effects of which, pernicious as it is to society, are exemplified no where more signally and more disastrously *than in the character of those concerned, no matter how, in its administration*. To me, I confess, the mere fact that the forms which now regulate our proceedings, and which are applied by *perverted ingenuity to the complicated transactions of a society such as ours*, were invented in a rude age, and contrived by English lawyers in the fourteenth century, appears decisive of the question—Is law not within the province of experience?”—*Thoughts, &c.* pp. 3, 4.

Unsparring as this language is of the character of the inventors, the professors and the reformers of special pleading, and of the judges who uphold it, it is not more severe than that uniformly adopted by Mr. Phillimore, who observes, “The man who would waste a moment in arguing with the advocates of special demurrers, is unworthy of all leisure.” (*Thoughts, &c.* p. 6.)

We must, whilst agreeing in substance with Mr. Phillimore's views, enter our protest against this unnecessary vehemence of language and intolerance of antagonism. Every lawyer who conscientiously dissents from his views and adheres to usages at least time honoured, is well worthy not only of Mr. Phillimore's leisure, but of his patient consideration.

Sir William Jones, who we can hardly conceive our author to class with those whom he represents as acting "*from honest bigotry in many instances—from the pedantic vanity of minds contracted by inveterate habits of pettifogging, in more—from the ignorance of jurisprudence (which has always formed one chief part of a legal education among us)*"—was of opinion that English special pleading was the best logic in the world next to mathematics; see note to 3 Wooddeson's Vinerian Lectures, Lecture 44; Works of Sir William Jones; Preface to Isæus, vol. iv. p. 34; and as a reasonable proof that there is something more in the bulk of English judicial decisions, than, as Mr. Phillimore designates it (Letter, &c. p. 29), the *mere decision of technical points*, we need only refer to the reputation which the tribunals of this country have for so many years enjoyed in questions of commercial, maritime and international law, contributing in no inconsiderable degree to make marine insurances effected in this country an object with merchants in every quarter of the globe.

Can our author moreover inform us why, if his crusade against our system of judicial procedure is just, the fact is to be accounted for, that, in the works of the great American Jurists, for one American authority cited there are five hundred derived from the decisions of English tribunals?

Some inaccuracies have been diligently pointed out in Mr. Phillimore's statements with regard to the Scotch system of pleading, which he so much applauds, as well as the regulations recognized by the civilians as applicable to judicial forms. It is not our intention to accuse Mr. Phillimore of more than inadvertency, though we cannot help thinking that by a little more attention to a work, of all modern publications the least entitled to rank as the production of a *leguleius, formularum cantor, or syllaburum auceps*, Stephen on Pleading, (who is called throughout by our author *Mr. Stephens*)—he would have seen that, in ordinary cases, the very object which he advocates in order to bring the litigating parties to a specific issue, is much more speedily and satisfactorily done under the present system of special pleading than by any unsettled and informal statements which he would substitute, even though his own suggestions were carried out to the letter: viz. that "*the facts asserted by one party, and denied by the other, should then be set down on a paper signed by the parties and the judge, and so referred as an issue now is out of chancery to the consideration of a jury. If either party should refuse to deny a relevant fact, stated by his antagonists, it should be taken as admitted. If either party refuse to sign the paper containing the facts stated by him, and denied by his antagonist, or vice*

versâ, he should be obliged to state his objection, to appeal in a short time (say two days) to the court above, and if the objection was dismissed as frivolous, to pay the costs of the appeal."

The chief rules of pleading laid down in *Stephen on Pleading*, the result of ages of that experience which, Mr. Phillimore complains, is so little applied to the science of law, would have shown our author that it is for the express purpose of confining each party to the statement in his complaint or defence of relevant facts, without mixing up matters of evidence, that our forms of pleading were framed; and the breach of these rules has led to the evils pointed out by Professor Bell in the Scotch system. Much simplification is doubtless needed. Nevertheless that old and settled forms are the most convenient, and, in many cases, the shortest and the most conducive to the ends of justice, must be apparent, when we consider the consequences of all attempts to allow parties to dispense with forms, and adopt their own style of language. The object of a great portion of the equitable jurisdiction of the Court of Chancery we know was to give redress in cases where the forms in courts of common law precluded the parties from obtaining justice. The style of pleadings or *statements of facts* by way of bill and answer, &c., in the Court of Chancery, will serve to show the advantage likely to be gained by substituting for known forms, specific statements applicable to the ramifications of each particular case. Nay, it is a well known result of dispensing with strict forms in legal proceedings, that more questions arise on the relevancy and the sufficiency of the statement, than the most quibbling lawyer could found on the established forms of pleading. Take for example the grounds of appeal under the Poor Law Amendment Act, which provides, that with the notice of appeal, &c., the overseers appealing shall "*send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal,*" 4 & 5 Will. 4, c. 76, s. 81. The questions which every term arise, as to what is a sufficient compliance with this simple requisition, exceed those which the rules of special pleading give rise to; and so much has it been deemed a prudent step to restrict litigating parties to definite forms, that in a mass of modern acts of parliament relating to the revenue, the police, &c. &c., the actual forms of proceeding are expressly prescribed.

The accomplished scholar, whose commendation of the English system of special pleading has been before alluded to, observes, "Nor shall I easily be induced to wish for a change

of our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analyzing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity, to the court or the jury: it is reducible to the strictest rules of pure dialectic; and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding."—Jones's *Isæus*, Preface, p. xxv.

Mr. Phillimore has shown considerable industry in his selection of cases, where inattention to the refinements of pleading has been productive of injustice. Let him only display the same industry and zeal in devising means to prevent such injustice being caused to the suitor, by the judicious simplification of pleadings, but above all by proper regulations with respect to amendments and costs, and he will receive more honour and more credit than by attempting the overthrow of the entire system itself of special pleading, disregarding the united wisdom and experience of all the judges of Westminster Hall, who, when empowered by act of parliament, without any possible motive to protect the old system, contented themselves with making such changes as would insure more definite and concise allegations, and confine rather than extend the latitude allowed to the suitor under them.

Mr. Phillimore would confer a great boon on the profession, and materially contribute to the cause of justice, and the true dignity and respectability of those who are concerned in its administration, if he would display the same zeal with regard to reforming the practice as to drawing the pleadings in a cause, as he has with regard to the *forms* in which they are drawn.

In ancient times we are told the written pleadings were always drawn by barristers, and that none but a regular *advocate* (or, according to the modern term, *barrister*) could be a pleader in a cause not his own. (Stephen on Pleading, App. note 8.) Within a comparatively recent period, a class of professional persons has been gradually called into existence, under the denomination *par excellence* of "Special Pleadors;" to whom, in defiance of the salutary provisions of our common law, the greater part of the business of drawing the pleadings in a cause is entrusted; and on whom, when subsequently called to the bar, very considerable privileges are conferred. This class of practitioners, at first, it is probable, existed merely by suffer-

ance, the illegality of their profession being shown by the long established rules of court requiring all important pleas to be signed by barristers. The class of *certificated* special pleaders and conveyancers were first legally recognized by the 44 Geo. III. c. 98, sect. 14, being then allowed, as observed by Mr. Chitty, himself a special pleader of no mean pretensions, "to practise rather for revenue purposes than upon any principle of sound policy." "Before that act, (he continues,) and indeed since, upon being entered, and becoming a member of one of the Inns of Court, for which is to be paid 25*l.*, (required by the subsequent act, 55 Geo. III. c. 184, schedule, tit. Admission and Certificate,) and also upon paying for an annual certificate of 12*l.*, or 8*l.* according to time and distance, *any person, however insufficiently educated, and however ignorant of the legal profession, such as inferior schoolmasters, and unadmitted or discarded lawyers, are allowed to draw conveyances and deeds, and other documents relating to real and personal estate, thereby interfering with the fair profits of regular practitioners, though ultimately by their blunders frequently occasioning a compensatory return of litigation.*"

Such is the effect attributed by one of the most eminent special pleaders of this age to the act of parliament by which the very *status* of the class was first legally recognized; and, considering the perfect apathy exhibited by the Inns of Court in inquiring into the character of those who present themselves for admission, what possible security is afforded at this day, that the very evils which in the case of attorneys and solicitors the legislature has so carefully guarded against, may not, for the sake of the trumpery advantages accruing to the revenue, occur in all their force among those who, by an acknowledged innovation, are in some degree identified with the venerable institutions of the bar of England?

The Inns of Court, it may be said, have by a general rule imposed upon candidates for admission, a restriction from availing themselves of the licence to practise as conveyancers, special pleaders or equity draftsmen, until they shall have kept the same number of terms as would qualify them to be called to the bar. In other words, the Inns of Court have annexed to the admission as a member terms which, whether deriving their force in the shape of a condition, a mere contract or a positive bye-law, are really void as being in contravention of the express provisions of an act of parliament. Such a solemn condition, it is true, it may be expected, no one who ever contemplates raising his head at the English bar, would have the hardihood or the folly to infringe, but it must be obvious that such are

not the persons likely to create the evils pourtrayed by Mr. Chitty. The man who would throw overboard the solemn engagement he has entered into, in order to avail himself of the act of parliament, would be quite contented to do so without ever looking forward to be called to the bar, and if an example were wanting to show the possibility of such a case, one is afforded in the police reports of the moment, whilst we are writing. The Times of this day (23 July, 1847), under the head "Mansion House Police Reports," describes the investigation of a charge of forgery by an attorney's clerk. One of the precious documents exhibited as the fruits of his alleged forgery, is a receipt from the Honourable Society of Lincoln's Inn, on the prisoner being admitted a member. Would such a person, and he of course is only an instance of a class, be likely to hesitate in availing himself of a clear statutory right because he had entered into a personal engagement not to do so?

If there is no force even in these objections to a system by which the Inns of Court have been converted from juridical universities into societies for the mere registry of parties declared *ipso facto* qualified to draw legal documents, and to usurp the ancient functions of *pleaders*, some consideration may be paid to evils which practically result even from the *regular* working of the existing system, namely, that gentlemen duly qualified to be called to the bar—having gone through the same ordeal, and who are invested by various acts of parliament with all the advantages enjoyed by barristers with respect to official appointments, &c. should be countenanced in *underselling* their professional brethren in the market—should in fact consent to take a fee of seven shillings and sixpence, where the general etiquette of the bar has prescribed the minimum at a guinea?

Surely it must be a false etiquette which enables one man, in every possible way identified with a class, to do that which other members of that class are rigidly precluded from doing. Whether it is deemed correct for the smaller or for the larger rate of remuneration to be afforded for a given quantity of work, upon every principle of propriety and common sense let that rate be uniform, or at all events let not the difference be upheld by an unmeaning and groundless etiquette.

Were no ill consequences, however, connected with this fanciful distinction of fees between two classes of pleaders of the same standing and qualifications, the evil might be simply left to find its own remedy, but according to the existing practice the suitor is the real sufferer. "In the multitude of counsellors there is wisdom," we are told, but we cannot conceive anything but folly ensuing from a diversity of council in legal affairs.

The suitor under the present system of legal procedure first goes to his attorney to advise him as to his complaint or defence. The attorney, except in a very few cases, when the extraordinary step of a formal case and counsel's opinion is required, either has verbal advice from a special pleader, or waits until it is necessary to have the particular pleading drawn; when the gentleman who is called upon to draw it is fully instructed on all the points of the case, thinks over them at his leisure, and is enabled at the same time that he shapes the requisite *formula*, to judge of the evidence requisite to support them. The pleadings being completed, the same inducement of cheap advice makes the attorney give the preference to the special pleader in the selection of an adviser on the evidence, and when ultimately the case is set down for trial, the gentleman who has so elaborately investigated the case from the beginning is disqualified from holding the brief, and the attorney is compelled on the very eve of the trial, sometimes indeed within a few minutes of the cause being heard, to *instruct* a fresh counsel, viz. to furnish him with copies of the formal pleadings, the motives for framing which he is wholly unacquainted with.

Thus the division of labour which, in avocations merely mechanical, is productive of so much good, in the case before us produces the very opposite results, and yet it is obvious that the inconvenience may be remedied by a few lines of "instruction to the taxing officers" from the bench, making it equally to the interest of the attorney to employ one counsel to investigate his client's case and conduct it afterwards in court, instead of leaving, as at present, one counsel to carry out what another has planned.

The adoption of this simple alteration would be one step in destroying that appearance of chicanery in our legal proceedings which Mr. Phillimore so zealously attacks. Were attention to the leading rules of special pleading made essential to every counsel who attempted to conduct a case in a court of law, and the proceedings from the commencement of the suit known to the advocate, a more effectual guarantee would be afforded against abuses of every kind than can possibly now exist with the latitude and discretion allowed to the attorney to wander in the same case from one counsel to another, and with the consequent immunity from blame which the several counsel employed enjoy, when pleadings which the one has drawn turn out on the trial of the case inapplicable to the circumstances, or the evidence elicited by the other is glaringly inapplicable to the pleadings.

We are not without hopes that this desirable change in the routine and etiquette of the bar, the consideration of which has,

after previously mature conviction, been recalled to our attention by the remarks of the author before us, may serve also most effectually to elevate and improve the bar as a body, to habitually discipline those who assume the character of advocates in that masterly branch of legal science which, not *pettifoggers* as Mr. Phillimore will have it, but sound lawyers and logicians can alone excel in, and to withdraw from exclusive devotion to this one branch of law men who are worthier of a better destiny than, after the labour of half a century, to be classed with the Sawyers and the Saunders and those other black letter sages who are treated by our author as "the pest and scandal of their profession and the country."

We repeat our conviction that Mr. Phillimore deserves great commendation for his energetic attempts to eradicate mere quibbling from the practice of the law, we are sure that no liberal minded man, be his legal attainments what they may, can read the various cases so industriously collected in the pamphlet before us without being satisfied that some attempt should be made to prevent, in every legitimate way, the rights and interests of suitors being sacrificed by technical mistakes. We think, however, for the reasons already given, that the way to effect this is not by unsettling the present established forms of legal proceedings in our courts of law and introducing fresh ones whose latent defects time only can disclose. We would rather endeavour to prevent attempts at mere quibbling by removing senseless and impolitic innovations respecting practitioners, and thus removing all inducement to seek for fame by a devotion to technicality, whilst special pleading would have a chance then of becoming less an art and mystery than a legal science, followed by all who assumed to act as advocates in our courts.

There is another very essential advantage derivable from the blending of the provinces of pleading and junior counsel. The natural effect of the isolation of the duties of a pleader, and his complete severance from the courts, is that he is ignorant of much of the requirements arising from the peculiarities of practice and the incidents of a trial. No one who is not versed in the experience of these can effectually prepare evidence and get up cases. There is an art in the management of cases in court, and, far more important still, there is an art in consulting the fickle temperament of juries and the almost equally formidable influence of judicial conduct,—all of which require to be duly considered in moulding actions and arming advocates; and with which it is next to impossible that a special pleader, immured in chambers and addicted by dint of habit to pedantic views of the paramount importance of the *formulae* and techni-

calities of his narrow craft, should adequately understand or appreciate; and yet a knowledge of these matters is often essential to the success of the preliminary steps in an action at law. We have great respect for many pleaders, and we must be understood to speak here of the tendency of their position and habits of mental exercise rather than to any predisposition to pedantry, or natural incapacity to take broad views.

Perhaps one simple remedy for the evils of which Mr. Phillimore complains would be found in giving largely increased facilities of amendment of defects in pleading. We have the authority of an experienced special pleader, recently called to the bar, for thinking this perfectly feasible and highly desirable. It is required, moreover, as a check to that narrow conceit which sometimes induces a pleader to fight his pleadings rather than amend, at any cost to his client. This not unfrequently happens. We propose that, when a defect shall be pointed out on demurrer, both parties shall be bound to acquiesce in amendment, on terms to be settled by the judge. And that the judge shall make the amendment he thinks fit, after hearing both parties at chambers. It ought not to be left to the option of the belligerent parties to wage a costly warfare about a word. Amendments should be compulsory. And this, we believe, would be the best remedy for the evil.

We have scarcely space to allude to some other subjects ably handled by Mr. Phillimore; his remarks on the fictions which continue to be used in the actions of replevin, trover, and ejectment, are well deserving of attention, nor are the observations which follow, in the subjoined extract, on the subject of other mystifications in our system of pleading, without their force.

“How long is an action, and an action of every day’s occurrence, to be begun in an inferior court where the judge has no power to decide it; solely that the parties may be put to the expense of removing it to the court above? How long, in another, is a man to say that he has lost what he has not lost, and his adversary to admit he has found what he has not found? And how long is such a vestige of rank and genuine barbarity, as *Mr. Stephens* has described in the words I quote, to remain as a proof of the inveterate prejudice, and stubborn reluctance to change of the English nation.

“‘In ejectment, as already observed, the whole method of proceeding is anomalous, and depends on *fictions invented and upheld by the courts for the convenience of justice, in order to escape from the inconveniences which were found to attend the ancient forms of real and mixed actions.* An ejectment commences by delivering to the tenant in possession of the premises a declaration framed as against a *fictitious defendant* (for example, Richard Roe), at the suit of a *fictitious plaintiff* (for example, John Doe). This declaration is framed as if it had been preceded by original writ against Richard

Roe; but is, in fact, the first step in the cause. Subscribed to this declaration is a notice, in the form of a letter, from the fictitious defendant to the tenant in possession, apprising the latter of the nature and object of the proceeding, and advising him to appear in Court in the next term to defend his possession.*—*Stephens on Pleading*, 33.

“How long is a liberal profession to be disgraced by the jargon of special traverses, and giving colour, express and implied, and replications ‘de injuriâ absque tali causa,’ and replications ‘de injuriâ absque residuo causæ,’ and actions in trover, and assumpsit, rendering the nature of a case utterly unintelligible to all but lawyers, and obliging the judges to pronounce such shocking decisions as those which I have enumerated.”

Perhaps, however, the most sensible observations on the abuses in the administration of justice throughout Mr. Phillimore’s observations occur in p. 78 of the *Letter* in reference to the system adopted at Quarter Sessions.

“5. The next point is, the constitution of the courts of quarter sessions. There has been much declamation among persons never likely to have their honour or happiness affected by its jurisdiction, as to the advantage of fixing the attention of country gentlemen on the administration of justice, the malignant purposes of those who wish the system altered, the horrors of the French Revolution, and the wisdom of the Norman legislators—in short, upon every conceivable topic except the real questions, which are these: Is it important that a judge in this country, on matters involving the dearest rights of his fellow citizens, should have a legal education? May not questions quite as difficult arise at quarter sessions as in the crown court at the assizes before a judge on circuit? If the courts of quarter sessions are unfit to be trusted with the trial and decision of capital cases, how can they be fit to be trusted with the decision of others to which, for instance, the punishment of transportation is annexed? How is it possible that they should be a proper tribunal to decide upon one class of cases and not upon the other, as the legal

* * Let this jargon be compared with the French code.

“61. L’exploit d’ajournement contiendra.

“La date des jour, mois et an, les noms, profession et domicile du demandeur, la constitution de l’avoué qui occupera pour lui, et chez lequel l’élection de domicile sera de droit, à moins d’une élection contraire par le même exploit;

“Les noms, demeure et immatricule de l’huissier, les noms et demeure du défendeur, et mention de la personne à laquelle copie de l’exploit sera laissée;

“L’objet de la demande, l’exposé sommaire des moyens;

“L’indication du tribunal qui doit connaître de la demande, et du délai pour comparaître; le tout à peine de nullité. (Pr. l. 68; *Délais suspendus*, 440; *Peines, nullités comminatoires*, 1029.—T. 26, 87.—l. Cr. 72.)

“En matière réelle ou mixte, les exploits énonceront la nature de l’héritage, la commune, et, autant qu’il est possible, la partie de la commune où il est situé, et deux au moins des tenans et aboutissans; s’il s’agit d’un domaine, corps de ferme ou métairie, il suffira d’en désigner le nom et la situation: le tout à peine de nullité, 64.”

questions which arise in them are identically the same, and are in no degree affected by the nature of the punishment awarded to the offence? Why should you not give the poor man's character, happiness and liberty, the same protection you admit to be necessary for his life? Or, to bring the question to a still shorter issue, let any of the advocates of the present most anomalous system, answer this question: Would you, or any man fit to go about without a keeper, knowing yourself to be innocent, choose to be tried by a court of quarter sessions or by a judge? On the answer to this I would stake the question. If the answer be, as it must be, by a judge, what horrible injustice it is to the humbler class of the population not to confer upon them the same benefit? Are they not entitled at least to share equally in that grand object for which society was instituted—the administration of justice? Are they not entitled to all the knowledge, all the trained thought, all the patient exercise of the intellect, all the command of attention to dry and repulsive topics, all the power to pursue legal argument, to detect fallacy and to discover truth—which are the result, to a certain degree at least, of professional discipline and professional pursuits? If a hovel is claimed on a waste—if there is a dispute about a potato field—it is in the power of the person interested to retain the ablest counsel. His case can only be tried by a judge of the superior courts. It is in his power also, if dissatisfied with the decision, to appeal against it, and to subject every part of the proceeding to the strictest examination and review. He may complain of a fact that has been overlooked, of law that is mistaken, of language that is, however slightly, inappropriate. But if the liberty, the character, the fortune of a labourer is at stake—if his present prospects and future respectability are in jeopardy—he may be, and constantly is, tried before a country gentleman, *i. e.*, before a person utterly unaccustomed to such an exercise of his faculties, and utterly ignorant of law. From the decision of that country gentleman on any point of law, from his carelessness or mistake, there is no appeal."

These pamphlets are throughout replete with broad views, great thoughts, and brilliant genius. As a law reformer Mr. Phillimore wants moderation, but this he will easily attain, and the elements of all that is requisite to the proudest achievements of intellect are his. In addition to profound research and vast erudition, keen wit, and great powers, alike of rhetoric and argument, he possesses lofty impulses and a generous devotion in the cause of the emancipation of mind from the fetters which have, in old times, so sedulously trammelled its energy and depressed its spirit in every profession and department of public life in England, and of which so many vile remnants still cling to our noblest institutions. May he proceed with chastened and redoubled energy in his worthy enterprise.

ART. VIII.—THE NEW HOUSE OF LORDS.

ALMOST thirteen years have elapsed since the ancient halls in which the British parliament had for centuries assembled were consumed by fire. The event was at that time deplored throughout the country as being in its degree a national calamity; and this, not so much from considerations of the money-value of the property destroyed, or of the outlay which the reconstruction of the houses necessarily must charge upon the public funds, as for the destruction of relics endeared to Englishmen by associations of historical interest and national glory, which money, miracle-working as it is, could never restore. Amongst these was the Painted Chamber, where, with the benediction of mitred prelates, Edward the Confessor—vindicator of the laws and benefactor of his people!—yielded up the ghost; such also was the hall wherein, during the feudal ages, were received the petitions of suitors for justice or favour from the sovereign, and which for centuries witnessed the deliberations of the haughty peers; and such, especially, the chapel founded by King Stephen (and which bore his name), where sat the jealous commons, resisting from time to time the encroachments of the other states, and providing for the necessities, and watching over the interest, of the common weal.

The closing scene of these time-honoured fabrics was impressive. Theirs was no piecemeal or slow decay; but, as if conscious that they had lingered too long, and intruded themselves far into an age to whose demands they were unequal, and for whose luxurious notions of comfort they had never been designed, they shrouded themselves in flame and expired grandly, leaving modern art to provide for modern convenience in the form of a structure better adapted to the requirements of the times, which should stand in their stead; and magnificently this is now being accomplished.

Although the fire which destroyed the houses of parliament happened in the autumn of 1834, upwards of four years were permitted to pass before the new palace was commenced. Temporary accommodation was immediately provided for parliament; and in *four months* after the appearance of the government advertisement for designs, not fewer than ninety-seven were submitted, of which so manifestly superior was the one contributed by Mr. Barry, that it was unhesitatingly adopted; nor, so far as we remember, was there the slightest outcry on the part of any of the ninety-six unsuccessful competitors raised against

the selection of Mr. Barry's design. When the brief time allowed for preparing elevations and plans for the new palace is considered, the wonder is that so perfect, beautiful, and convenient a structure could have been thus suddenly designed. But this is *the age of architecture* in England. From the time of William of Wykeham to the close of the last century, the sum total of the talent afforded by the country in this department of the arts—and it includes some brilliant names, witness Inigo Jones, Wren, Gibbs, and Chambers—did not exceed the array we can command in Barry, Snirke, Cockerell, Burton, Tite, and Blore. This opinion, having to contend with prejudice—for it has long been a fashion to laud the old architects and decry the moderns—may at first sight appear rash and ill considered; but we submit it is not so,—and we challenge comparisons of the best works of the ablest of our deceased architects with the productions of the living artists we have named, in full confidence that a dispassionate examiner, if competent to decide, will pronounce judgment in favour of the architects of the present day. Take a broad survey of the country, and observe the numberless beautiful churches which within *ten* years have been erected; all built in the purest taste, under the particular style selected, whether Norman, early English, perpendicular Gothic, or other form; look also at the public buildings erected in the provinces; examine the country seats lately built; consider the improved character of our street architecture; and observe the tendency shown, even in breweries, foundries, and factories, to combine the ornamental with the useful, and the conviction will be irresistible that this, as we have above asserted, is *the age of architecture* in England. Hitherto we have spoken only of exteriors—of the distribution and balance of parts, and the general effect of buildings, as a mass, upon the eye. But there are other and important qualifications demanded of the architect, in respect of which the boldest supporter of by-gone talent must at once surrender pre-eminence to the genius of this day, and that is in the arrangement and decoration of interiors. Convenience of purpose, personal comfort, free ventilation, the abundant admission of light, and the equal diffusion of heat—all being essentials—were never so successfully studied as they are now. This is strikingly apparent in the new palace at Westminster, where all these requisites have been happily combined.

Until recently chromatic art for decoration was almost entirely unknown in this country; and it is yet so new and strange, even to persons of cultivated taste in other respects, that the single objection we have heard made by such to the superb chamber which forms the subject of the present article, has

uniformly been, that it is overcharged with gilding and colour. This impression arises from the meagreness and poverty of the decorations to which they have been accustomed, and that hitherto have characterized our interiors. Architects, when they had completed the *material* part of the work, seem to have considered their task accomplished, whereas it was but half done. The Egyptians, the Greeks, and the Romans, beautified their edifices with vermillion and azure, gold, purple, green and other colours. In the fifteenth century, among the Italians, decorative art was carried to the highest conceivable degree of excellence. It is impossible to imagine anything more gorgeous and interesting than the embellishments of the churches and palaces of Italy at that period. All the resources of the highest genius were devoted to this purpose, and the walls of the Vatican, the Sistine Chapel, the Loggia, and Villa Madama, enshrining, (among rich arabesques, flowing foliage, rare grotesques, and reticulated and diapered tracery,) the noble frescoes of Michael Angelo, Raffaele, and Giulio Romano, attest the value and importance they set upon this form of Art. If these nations, then, although severally inhabiting a sunny and cheerful land, were so lavish of attention upon interiors, and beautified them at so much cost, (and it should be borne in mind that they excelled all others in the fine arts,) how much more desirous should we be, who live for the most part in a gloomy and heavy climate, to profit by such accessaries, and make our very walls luminous and interesting by the admission of frescoes and rich ornaments in gold and colour. The valuable and costly work by Mr. Lewis Gruner, published some four years ago by Mr. Murray, on the decorations of the churches and palaces of Italy, (its exact name we do not remember,) has produced a beneficial effect on the adornment of interiors in the buildings since then erected, and it will do yet more. It is clear that Mr. Barry has largely profited by the illustrations it affords in designing the decorations we shall presently notice.

It was not until the year 1840 that the parliamentary offices and speaker's house of the new palace were begun. Immediately after the Easter recess the peers entered upon the noble chamber dedicated to their use. When it is considered that the entire range of buildings cover a space of no less than nine acres, and that the whole has been carried up together,—taking also into account the dispute (perhaps unavoidable) of the architect with Dr. Reid as to the warming and ventilation of the buildings, which necessarily retarded the works,—we cannot but think that all speed consistent with safety and good workmanship has been applied to this vast undertaking. Certain we are that,

with no better appliances of mechanism to lighten and facilitate labour than were possessed by the architects of the middle ages, whatever the wealth at their command, they could not have done so much in so brief a time. To the charge of tardiness, then, in more than one quarter imputed to Mr. Barry in the matter of the houses of parliament, we by no means assent; and we think those inconsiderate who have preferred it.

Next session, in all probability, on the occasion of the entering of the Commons upon the hall constructed for their use, the new palace will be formally opened; we reserve therefore for that occasion, as being more appropriate than the present, a description of the entire building, its parts and purposes, contenting ourselves with laying before our readers a pen-drawn picture of the House of Lords, and the Peers' Lobby which forms the approach to it.

EXTERIOR OF THE HOUSE OF LORDS.

Viewed from the House Court, the exterior of the new House of Lords is not so richly covered with tracery and ornament as the river front. Above an arcade of flattened arches, which serves on both sides as a corridor to the house, rises the side-wall, in which, between plain and massive buttresses, are the six beautiful Gothic windows, which light the house; above these rises the parapet, broken into deeply cut battlements. We should here observe, that the style adopted by Mr. Barry for the palace is the florid Gothic, but not such as we find it in our abbeys and churches, it having been the aim of the architect, (as he has himself expressed it,) "to avoid the ecclesiastical, collegiate, castellated, and domestic styles, and to select that which he considers better suited to the peculiar appropriation of the building." Frequently, when architects venture to construct a style of their own, though keeping under government of some dominant order, we find them fail in grafting their variations upon the original, and their building is incongruous and bad. Here no such objection applies; the new combinations harmonize so finely with the ancient forms, that it is impossible to take exception to a part, and the triumph of Mr. Barry over difficulties that would embarrass and ruin a lesser genius, is signal and complete.

THE CORRIDORS.

Here, before we enter upon the lobby and house, we may mention that the corridors, extending along both sides of the grand chamber, are wainscotted and ceiled with oak, intersected with bold mouldings, in which gold and colour are sparsely

admitted. The windows are square-headed, and divided by mullions; the glass is diapered and stained, and contains labels disposed diagonally and charged with the motto "*Dieu et mon Droit*." The carpet is of deep blue; and in the recesses opposite to the windows are cushioned seats of red morocco. Above these are branches for gas, and opposite the doors, leading from the body of the house, are globe lights pendant from the ceiling. These corridors, connected as they are by doors with the house, are used by the peers for divisions.

THE PEERS' LOBBY.

This grand vestibule is a square of about thirty-five feet, each side being divided by square buttresses, panelled on the face, gabled with crockets and finials, and crowned with demi-angels bearing shields with the Garter and V. R., and from these angels spring the roof. In the centre of each side is a deep-recessed doorway, having quatrefoils in the spandrels, with the rose and portcullis in their centres. Above each arch is a series of six small ogee arches, within which are painted the arms of the six royal houses which have successively filled the British throne. In the windows flanking the east and west doorways are emblazoned the arms of England, Scotland, and Ireland. The north doorway opens on the long corridor leading to the House of Commons, and the eastern and western doors lead into corridors connected with the libraries and other rooms; above them are clocks with dials beautifully enamelled in white, gold, and blue. The southern door, through which access is obtained to the bar of the House, corresponds in general form to those in the other sides of the lobby, but in the details greater magnificence is displayed. The arch is deeply moulded, and round it run rose-leaves richly gilt, with Tudor-roses at intervals, boldly sculptured in relief and coloured. The space over the arch is divided into five compartments, the centre quatrefoiled, and bearing a shield of the royal arms of England, surmounted by a crown, and having the motto "*Dieu et mon Droit*" on a blue label. The panels on both sides are likewise charged with heraldic bearings. At the inner doorway are the superb gates, brass-gilt, which have attracted so much attention, and been so universally admired. A full description of them would occupy pages; we must, therefore, pass them by with the remark that they stand unrivalled in this country, as works in metal, for beauty and variety of design, and for the masterly skill with which so stubborn a material has been wrought into graceful forms. At each angle of the lobby-floor are magnificent Gothic standards of brass for gas-lights. The

floor is of encaustic tiles of heraldic patterns; and in the centre is a red and white rose in coloured marbles on a blue ground, surrounded by a margin of twining roses in brass, inlaid on a blue enamelled ground. The ceiling is divided into compartments deeply ribbed and moulded, and decorated with colours slightly relieved by gilding. Pendants with gilt crowns are at the intersections of the main beams. The spaces between the beams, and also between them and the walls, are subdivided into squares by lesser beams, within which the ceiling is gilded, and on it are painted the rose, shamrock, and thistle, alternating on a blue ground; and in the centre of the whole is a circular compartment, within which is painted a red and white rose, surrounded by a radiating nimbus on a deep blue ground. The mottoes, "*Dieu et mon Droit*" and "*Domine salvam fac Regnam*," are often repeated around the walls. Leaving this superb vestibule, (which we have but half described, so varied and numerous are its beauties,) pass we now through the noble gates of brass above mentioned into

THE HOUSE OF LORDS.

If to describe the Peers' Lobby were difficult, tenfold more arduous were the task of enumerating and setting forth the features of this truly regal chamber. Although the eye has already been exalted by the splendour of the vestibule, the gorgeousness of "the House" itself strikes with surprise, and forces from the least excitable spectator exclamations of wonder and delight. After the sight has become a little accustomed to the splendour that dazzled it, and the judgment applies itself to examine particulars, the first thing that impresses is the harmony of the proportions of this chamber. It is ninety feet in length, forty-five in breadth, and forty in height. The architectural tracery, the decorations in gold and brilliant colours, the beautiful windows, the compartments for frescoes, and the sculpture introduced, are all under the government of the justest taste. Although the oppositions are bold, they are always judicious; there is not a single incongruity at which the most fastidious judge may take exception; there is neither tawdriness nor prettiness, but the whole is impressive, and becoming the dignity and character of the noble estate for whose use the chamber is dedicated. The "House" has been so well described in a small hand-book published by Mr. Clarke, that we transfer from its pages with free abridgment the following particulars:—

"The floor presents three principal divisions, extending transversely from east to west, each occupying the full breadth of the

apartment, but unequal parts of its length. In the upper or southern division are the throne, together with the spaces assigned to distinguished foreigners and eldest sons of peers. Next comes the central region, or 'body of the House,' which seems capable of containing the 440 Lords Spiritual and Temporal. The table and woollsacks occupy the middle portion of the floor. At either side of these are placed, on ascending steps, five lines of benches, covered with scarlet morocco leather, for the exclusive use of the Peers.

"At the lower boundary of this division is the Bar, which is about nine feet wide and three deep; it is ornamented by small sunken panels, having two rows of quatrefoils and arches. At each corner is a massive post, having the monogram V. R. within quatrefoiled circles; and a narrow panel, with pateræ. The two inner posts of the bar are crowned with small figures of the lion and unicorn holding shields; and the two outer are terminated by a cap, having battlements wrought on it.

"Affixed to the wall, on the right hand of the bar, is the enclosed and elevated seat of the Usher of the Black Rod. It is panelled and decorated in corresponding style with the extreme ends of the peers' seats, which have panels of extremely intricate treillage of vine, oak, rose, and thistle patterns, beautifully sculptured and pierced, let into them.

"The Clerks' Table is of wainscot, with a panelled top, standing on decorated carved legs; each resting on a projecting foot, richly foliated. The legs are fashioned like small octagonal clustered pillars, decorated with leaf ornament, having moulded bases and capitals. They are connected with each other by a deeply-moulded bar; and bars stretch across from foot to foot, having sunken panels between them, so as to convey, in plan, the general character of a portcullis—intended to represent the ancient arms of Westminster.

"The floor of the chamber is covered with a carpet of a very chaste design, of a royal blue colour, dotted with roses of gold.

"The ceiling is flat, and is divided—by tie-beams of great bulk, on each face of which is sculptured '*Dieu et mon Droit*,' twice repeated—into eighteen large compartments: these are each again divided, by smaller beams, into four, having in their centres lozenge-formed compartments, deeply moulded. Amongst the devices, and immediately over the throne, is the royal monogram, crowned, and interlaced by a cord; whilst, similarly crowned and decorated, the monograms of the Prince of Wales and Prince Albert fill the lozenges over their respective seats. The cognizances of the white heart, of Richard the Second—the sun, of the House of York—the crown, in a bush, of Henry the Seventh—the falcon, the dragon, and the greyhound, are in some of the lozenges; and the lion passant of England, the lion rampant of Scotland, and the harp of Ireland, fill others. Sceptres and orbs, emblems of regal power, with crowns—the scales indicative of justice—mitres and crosiers, symbols of religion, and blunted swords of mercy, add their hieroglyphic interest; while crowns and coronets, and the ostrich plume of the Prince of Wales,

form enrichments more readily understood, and equally appropriate. In the vacant corners, between the lozenges and the mouldings of the beams, the ceiling is painted of a deep blue, and surrounded by a red border, on which are small yellow quatrefoils. Within the borders are circles, which contain the rose of England, the pomegranate of Castile, the portcullis of Beaufort, the lily of France, and the lion of England; and the fanciful armorial bearings of those counties which, ages since, composed the Saxon Heptarchy. Where the lozenges are filled with the mitre, the circles are gules and charged with a cross; and issuing from the circle are rays, instead of sprays of roses. At the intersections of the tie-beams are massive pendants moulded, and carved to represent crowns; and lesser pendants, or coronals, similarly carved, are at the centre of each tie-beam; whilst richly-carved bosses are placed at the junctions of the smaller ones. The under surfaces of the pendants are sculptured to represent roses. The whole are gilded and enriched by colour.

"The Throne is situated at the south end of the chamber, and is raised on a dais of three steps. In design and workmanship it is exquisitely beautiful. It consists of a canopy in three parts, eighteen feet six inches wide—the centre rising much above the sides, in which is the chair of the Queen; on the back of this part are carved, gilt, and blazoned the royal arms, with the appropriate badges, emblems, &c. The ceiling is divided into small panels, on which are painted the red rose, with white rays on a gilt ground. On the upper part of this centre canopy are introduced figures, illustrating the orders of knighthood, in rich canopied niches, surmounted by open tracery. The lower canopy, on the right of the throne, is for the chair of the Prince of Wales, and that on the left for the chair of the Prince Consort. On the back of these canopies are also blazoned the respective coats of arms, and appropriate heraldic distinctions. Over the centre of the throne are niches, intended for the reception of statues of St. George, St. Patrick, and St. David, the patron saints of the three kingdoms.

"The floor is covered with a velvet pile carpet of deep red ground, powdered with lions and roses.

"Two candelabra, of most exuberant richness of design, stand on either side, a few paces in front of the throne.

"The Queen's chair is of the finest mahogany, about seven feet in height, richly gilt, and surmounted by an open Gothic crown, of elegant workmanship, supported on either side by the lion and unicorn, bearing shields. Beneath the crown is a triangular foliated compartment, containing the Sovereign's monogram, 'V. I. R.' The cushioned back is composed of regal velvet of the finest pile, bordered with the arms of England. Surrounding the royal arms are enamel ornaments in the Byzantine style, alternating with crystals of the purest water. In the openwork panels of the arms are heraldic lions, elegantly introduced amidst luxuriant foliage. The top of the arms of the throne is level, the ends being in an octagonal form, richly

moulded. The upright supports, on which are carved pinnacles, rest upon lions couchant.

"The chair of the Prince of Wales is about four feet in height, the back forming an oval, surrounded by a moulding of rose-leaves, and cushioned with velvet, richly embroidered with the badge of the Prince of Wales, girt with Gothic scroll-work. The arms are horizontal, and in the front form a half-circle, placed with the outer edge against the legs, which also form a similar half-circle; in the centre is a circular ornament containing the letter 'W.' The whole is finely gilt.

"The chair of Prince Albert is of similar design, with the exception of the embroidery of the back, in which are introduced the arms of his Royal Highness, surmounted by the multitudinous crests which Germans of gentle blood are usually entitled to display.

"The House is lighted by twelve lofty windows, six on each side; each divided by mullions and transoms into eight lights; the upper rows subdivided, and all filled with quatrefoil tracery. From the ceiling to the cill of the windows the walls are of a brown stone colour. The splay of the jambs of the windows is ornamented by the painted inscription 'Vivat Regina,' being many times repeated, intersected by roses on coloured grounds in quatrefoils, alternately blue and red. The windows will be ultimately filled with stained glass, representing the Kings and Queens—both Consort and Regnant—of England and Scotland, standing under canopies of elaborate design.

"Only one on the west side is yet completed. It shows figures of William the Conqueror, his Queen Matilda, William the Second, Henry the First, his Queen Matilda of Scotland, the Empress Matilda, and King Stephen and his Queen Maud.

"At both ends of the apartment are three archways, corresponding in size and mouldings with the windows; and on the surface of the wall, within the arches, frescoes will be painted.

"In the centre recess, at the south end, is a fresco painting, the subject of which is—

"THE BAPTISM OF ETHELBERT, THE FIRST

CHRISTIAN KING OF ENGLAND, by William Dyce, A.R.A.

It represents the King, a semi-nude figure, but crowned, kneeling before St. Augustine, who is attired in an alb, and over which is a mantle, gilded. St. Augustine has a small patera in his left hand, and with his right is in the act of pronouncing benediction. A youthful monk on his right hand holds an open book. An attendant is about to place the royal mantle on Ethelbert's shoulders, and the Queen, Bertha, wearing a circlet, is looking on the ceremony with an expression of interest. In the background, in an elevated part of the chapel, is a mingled group of men, women, and children, all watching the ceremony with the deepest curiosity; whilst a monk, on some steps leading to the elevated portion before mentioned, is haranguing the people, and evidently persuading them also to embrace

Christianity and be baptised. Beneath, it has the following inscription:—

“ *Fides Christiana in Angliam per S. Augustinum reducta
Ædilberctus Rex Cantie in Ecclesiam Dei baptizatus
In Urbe Doruvernensi, Anno Domini DXCVII.*

“ Five other arched compartments remain to be filled up by frescoes. These spaces are at present hung with crimson drapery, powdered with crowns and roses.

“ Between the windows, the arches at the ends, and in the corners of the House, are niches, rather lighter in colour than the piers, relieved with gilding, and partly with colour, the background being painted a diapered pattern, in chocolate brown with gold, richly canopied; the pedestals within which are supported by demi-angels holding shields, charged with the armorial bearings of the Barons who wrested Magna Charta from King John, and whose effigies, in all eighteen, will be placed in the niches; the Commissioners conceiving ‘that the difference of character as laymen, or as prelates, would afford a picturesque variety of attire, and that the historical analogy would be most suitably attained by placing side by side in the same House of the Legislature, in windows or in niches, the successive holders of sovereign power, and the first founders of constitutional freedom.’

“ The demi-angels, pillars, pedestals, and canopies are all gilded. Above the niches are corbels, whence spring spandrels to support the ceiling. These spandrels are each filled with one large and two small quatrefoils, deeply moulded, and having roses in their respective centres. Similar quatrefoils fill the spandrels over the windows, and all are elaborately gilded.

“ Below the windows, on each side of the chamber, down to the gallery, the walls are lined with oak panelling, elaborately carved. At every third panel is a pillar exquisitely wrought, and crowned with a small bust of one of the kings of England. Above the panels, between each bust, runs the following inscription—‘Fear God, Honour the Queen,’ in open-worked letters of the Tudor character: above this runs a pierced brattishing of trefoils, of great lightness of design and delicacy of execution.

“ The surface of the canopy beneath the Peereses’ Gallery is gilded, and decorated with the armorial bearings of the various lord chancellors of England, from Adam, Bishop of St. David’s, in 1377, in the reign of Edward the Third, when the peers first met as a separate House, to the present lord chancellor, Lord Cottenham, with the proper crests, helmets and mantlings, and labels containing names and dates of appointments, placed in juxtaposition with those of the monarchs under whom they served. These escutcheons present a remarkably rich and unique decoration; and, since all are helmeted, crested and mantled, the variety of colours so displayed, the mantlings partaking of the chief colours in the shields, is very striking.

“ At the northern end of the House, the episcopal arms fill the

spaces of the canopy. The front of the cove, or canopy, is moulded, having treillage in its lower moulding, and at every space corresponding to the pillars of the panelling is a small carved pendant; above it is a lion's head in strong relief, and thence spring the standards to the brass railing of the Peereses' Gallery.

"The railing of this gallery is of simple but exquisite design, having a series of roses, deeply wrought and foliated, running along its base. The standards are partly twisted; and between each runs a twisted rail, supported by segments of arches, foliated. A twisted rail passes along midway between the base and the top; and where all the rails and arches join each other, knots richly enamelled with colour and gilding give richness of effect and variety of outline to the whole."

"The Reporters' Gallery is at the northern end of the House, fronting the throne, over the principal doorway in the centre; on either side of which are three small arches under the Peereses' Gallery, each of them having a sunken panel above the arch, containing symbols of the Virtues, &c. held by angels."

"The Strangers' Gallery is above the Reporters', and is placed in the recesses of the great arches. It is very capacious, and seems admirably adapted for the purpose for which it is intended.

"The chamber is lighted by thirty-two branch lights, springing from the sides of the niches, burning gas on Faraday's ventilating principle, and by four splendid brass candelabra, two of them at the throne end, holding each twenty-five lights, and two at the bar end, holding each thirteen lights. The air necessary for combustion is supplied from without; the vitiated atmosphere is removed by means of its own high temperature; and the whole results of lighting the apartment are obtained by having the burners at once inside the House as far as illumination is concerned, but outside the building as far as regards all the products of combustion—decreasing a practical divorce between light and heat.

"Two magnificent candelabra of brass rise from the posts at the end of the peers' seats. They are about twelve feet and a half high, and consist of a shaft, ornamented with a leaf pattern, and supported at the sides by short pillars, crowned with *fleurs de lis*; at about eight feet from the ground, the shaft has eight flying buttresses projecting from it, each with tracery and pinnacle work; and from them in graceful curves spring out branches, with sockets for lights. Above this series of lights, four others, of lesser dimensions, add their intricate forms to the general richness, and the whole is crowned by a single light rising from the centre. The workmanship of these candelabra is most elaborate, and is worthy of their exquisite design."

Such then is the noble chamber in which the "second estate" will for the future act its part in the business of legislation, uphold its ancient privileges, and preserve, as best it can, the aristocratic element of the constitution. The House was opened for judicial business on Monday, the 19th of April last; present

the Lord Chancellor, Lords Brougham and Campbell; and on Friday the 23rd of July, her Majesty in person attended and dissolved the Parliament, on which occasion, and under auspicious circumstances, the three estates of the realm for the first time assembled in the New Palace of Westminster.

E.

ART. IX.—RETROSPECT OF THE SESSION.

ONE of the longest parliaments on record has terminated with a session remarkable for its barrenness. Before glancing at the results of the last session (as it is our intention to do at the end of each sitting), we may be permitted to say a few words on the general characteristics of the parliament which has just closed its career. It has been fruitful in great achievements rather than in great measures.

The Corn Law Act established the recognition of the great principles of free trade; but it did little, nor was it calculated to do much, more. As a revolution in the theory of commerce, it was a vast principle established; as a practical change, it was scarcely perceptible. Its results have been almost wholly negative, and they neither have had nor can have any effective influence on the price of provisions, which, including corn itself, has seldom been higher than since the repeal of the corn laws. It would lead us far from our province were we to dilate on the causes of this apparent phenomenon. Suffice it to say, that the last parliament has given to the doctrine of free trade the impress of a State truth; it has been lifted from the *inania regna* of democratic theory; it has ceased to be a trampled creed; it has emerged from the dirt and donned its golden slippers, and walks in sunshine and applause. This the last parliament has done; and doubtless the deed is in every sense a great one. In its accomplishment another equally great achievement was involved; and that is, the breaking up of party. Since the days of Lord North party had held a paramount dominion in England. Principles have risen and fallen in subservience to its sway. Great changes indeed have there been in the successive dynasties of party; but until lately its power has been unbroken and omnipotent. Sir Robert Peel achieved its disruption; and, assuredly, few more promising events have occurred in the history of parliament. It was suddenly felt that party was untrustworthy; that no class of politicians could safely rely on it for any purpose, no matter how lofty or how grovelling. Its

ascendancy was over, not because it was unpatriotic, but because it was impotent. A power which, however banded, organised and pledge-bound, could be cast to the winds at the will of one man, was felt to be no power at all. It was thenceforth a broken reed. Parliament could not use it, the people could not trust it, and it became an abandoned relic of a by-gone era. Its death-warrant has been ratified in this election. No one can foretell of what complexion the new parliament will be; there is no link left between the rulers of party and its tools: the reins are gone, and every man is free to follow the bent of his own judgment, or the dictates of his interest. The result is beneficial; at least it opens the field for a better state of things. The fall of party must lead to the exercise of opinion, and open the way for the ascendancy of principle. So long as the representatives of the people were in a measure constrained and trammelled, and their walk cast in political go-carts, impelled by men striving more or less for narrow interests, if not for factious ends, it was in vain to expect any great efforts of patriotism, or any effective and combined purpose of political action for the common-weal. We are hopeful of an epoch of sterling measures of national utility, the result of the strong power of good sense and good feeling that Englishmen possess, but which so seldom fructifies in parliament. Emancipated from the bondage of party, and freed in great degree from that effeminizing idolatry of "great men," which have combined to fetter and curb mental freedom and thwart intellect, we trust that opinion will gain vigour and judgment to assert its empire. It is a great marvel by how weak a handful of men vast mental prowess has suffered itself hitherto to be hoodwinked and led. May the time be at hand, when members of parliament will venture to be statesmen! We may then hope for legislation worthy of England.

The fruits of the last session have been remarkably small. The County Court Act, though it has taken effect in this session, was the produce of the last. It was perhaps, take it all in all, the most effective measure of the parliament which gave it birth. It evinced the apprehension and intense uncertainty of the approaching day of reckoning, fearful of any decided step or measure of an accountable kind, and gave no fruits of the copious experience and matured aptitude of a prolonged parliament.

The Poor Law Administration Bill, the Irish Relief Bill, the Ten Hours Factory Bill, and the Transfer of Property Bill in Scotland, are the only measures of any mark passed this session.

Of the Poor Law Administration Act we have elsewhere spoken. Whether it be a wise measure to render the supply of the Irish people in their distress dependant upon alms—alms, moreover, which are sure to be exhausted, perhaps just when the utmost need arises for them—is a question which it is not easy to determine. We shall say little on this vital subject; nor is there occasion, for the article on the “Law of Real Property in Ireland,” in this number of the *LAW MAGAZINE*, is replete with thought upon the causes and means of remedying Irish distress. The bill was well intentioned, and no doubt is a good temporary expedient. We doubt much if it be more than this.

The Factory Labour Act is a good and beneficial measure. By limiting the hours of labour of young persons in factories more time is afforded for their moral instruction, without any injurious interference with the interests of industry or capital. The Acts for facilitating the Transfer of Property in Scotland, the Service of Heirs Act, and the Burgage Tenure Act, are all likely to be useful.

The Juvenile Offenders Act is also passed. Our opinion is unaltered, that its good or evil effect will depend wholly on the establishment of penal schools. If magistrates are to commit ad libitum to prisons as they are at present constituted, the measure will be bad indeed.

The laws relating to navigation have undergone partial and not very material amendment. The Bankruptcy Amendment Act has also been passed, and with it a clause disabling county court judges from sitting in parliament.

The number of measures slaughtered or abandoned is unusually great. That which was most popular, and indeed most needed, was the Health of Towns Bill: it had become essential in many crowded places to the preservation of life itself; and a mass of disease must be laid at the door of the government for this most prejudicial and unnecessary delay of a remedy, admitted on all hands to be applicable to the emergency and requirements of the case. The bills on polling Electors in Ireland; the Railways, Prisons, and Thames Conservancy, have, with the usual quota of Poor Law Amendments, all yielded up the ghost, under the ravages of that parliamentary blight, so fatal at the close of each session to the early blossoms of promise which bloom at its opening.

“These failures (said Lord Brougham, who reviewed the labours of the session), this systematic and wholesale impotency, made one rather think that a strong government which one did not like might

be better than a weak government which one did like. The very worst feature of a republic was often said to be this impotency, which often arose from divided councils. Bishop Burnet related a conversation in which King William said that he had often doubts whether a monarchy or a republic was the better form of government, and that there were many arguments for each; but he added, that anything was better than a monarchy without power. And so said he—that anything was better than a ministry without power; anarchy and impotency incapacitated any government from performing its functions, and from keeping its bargain with the state to return protection for allegiance, and when protection ceased allegiance was no longer due. A perfectly weak government, that could not carry a single measure, could not have the means of giving that protection which was the very condition of allegiance. He sincerely hoped that he might never live to see such another session, or such a fate happen to any bills as happened to the Railway Bill, the Encumbered Estates Bill, and, above all, the Health of Towns Bill. His hopes were summed up in this, that he should henceforth, as the result of the general election, see the government, or whatever government was to rule the country, strengthened by the support of the people, enshrined by its own merits in the people's admiration and affection, and, above all, backed by such majorities in both houses of parliament, that it should not be necessary at the end of another session to stand up and lament over it, protesting against being understood to blame; but that there should be a government with such support that it might be perfectly clear that responsibility was on the government—responsibility which at present Lord Brougham confessed, painfully confessed, did not rest on the government, but was divided between the government and parliament. He hoped that divided responsibility might cease for ever; that parliament might be restored to its functions by the election; and that we should never, never again have to witness such a session of disappointment, ruinous to the character of government, injurious even to the character of the constitution, and hurtful to the reputation of the country at large."

To this Lord Lansdowne remarked that

"With respect to many bills, notwithstanding their withdrawal, if founded in justice and in the solid interest of the country, they were still useful bills even in their destruction, because they left seeds behind them which never failed to fructify. He agreed with his honourable and learned friend, and admitted the manliness of his declaration, that it was only by again and again stating in that House and elsewhere opinions which were unpopular, that their unpopularity could be gradually subdued, and that more intelligent views with respect to public exigencies and improvements became prevalent. Thus it happened, that after the repetition of arguments and opinions applied to bills that had failed, those arguments and opinions began to make an impression on the public, and ultimately had their effect

in carrying the desired measures to a successful issue. His noble and learned friend seemed to think that government had nothing to do but to propose bills and carry them. Now he believed that there never had been and never would be a government so strong in this country as to be enabled at once to subdue public opinion out of doors, and, in spite of the feeling existing in the country, to carry in one session great and important measures on their first proposal. What had been the history of all those great changes in which his noble and learned friend himself had borne a part, but a struggle in the first instance against public opinion, which had gradually been brought to conviction by repeated arguments and discussions, involving, however, the loss of session after session, and bill after bill? He could point out measure after measure, supported by men of the greatest ability, which had of necessity undergone this delay. The monopoly of the East India Company had been gradually subdued, against which for half a century government after government had struggled. In the course of that struggle one government was overturned, difficulties were imposed upon another; but ultimately, to the great advantage of the country, the monopoly was extinguished. Yet his noble and learned friend, with as much justice as he taunted the present government, might have attacked preceding governments for not carrying that measure sooner. What also was the history of the repeal of the Test and Corporation Acts, and of Catholic Emancipation? By the repeated discussions with respect to those measures public opinion became enlightened, and ultimately they were successfully carried. It was by long and continued discussions that those measures had been carried; and so, in like manner, a number of those ghosts of bills, as his noble and learned friend had styled them, would ultimately become the law of the land."

This excellent reasoning is conclusive. Nevertheless, we confess that we wish hereafter to see more concentrated efforts on the part of government in support of really useful bills. It is our purpose to give much consideration and development to that portion of legislation which affects laws really influential on the economy of *good executive government*—one of the highest branches of jurisprudence. We think the time has arrived when practical measures are urgently needed and generally demanded. They will form a worthy substitute for the noisy and fruitless struggles of party.

Notes of Leading Cases.

EQUITY.

LEGACY—RAILWAY SHARES.

Jacques v. Chambers, 16 Law Jour. Chanc. 243.

THERE were two important questions under the consideration of the court in this case. One had in effect been already decided in *Blount v. Hipkins*, 7 Sim. 51. There the testator had subscribed for twenty shares in a projected railroad, of 100*l.* each, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, freed from the payment of his debts, which he charged upon his real estates. An act for the construction of the railway had been obtained. It was decreed, by Shadwell, V. C., that as the personal estate was exonerated from his debts the widow was entitled to have the future instalments becoming due upon the shares paid out of the real estates. In the present case the testator was the original holder of and subscriber to the parliamentary contract for some twenty-five shares in the Great Western Railway. The question was, whether the legatee of those shares was entitled to require payment of the future calls upon them out of the residuary personal estate of the testator. The Great Western Act (5 & 6 Will. IV. c. cvii) contains clauses usual in acts of this description, enabling the directors to make calls, enjoining upon the owners of shares a liability to pay such calls, and giving an action to the directors in case of default, enabling owners to sell their shares, subject to the rule of procuring a memorial of the transfer, and rendering part owners liable to calls made after sale, unless such memorial is taken care to be made. Upon the construction of the act the court was of opinion that its effect was not to relieve parties who, like the testator, had executed the parliamentary contract, from the liability which they had incurred in respect of the covenant it contained on the part of subscribers to pay up when called upon to the amount of their shares; and therefore that the testator, as a subscriber, being personally liable at his death, his estate became immediately afterwards liable to the company in respect of these shares, however they might be bequeathed.

This being so, upon the authority of *Blount v. Hipkins*, it was ordered that the estate was liable for the benefit of the legatee. The next question was one which, it is believed, has not before arisen. It was sought to extend the rule laid down in *Blount v. Hipkins* to shares *purchased* by the testator, to make his estate liable to pay future calls for the benefit of the legatee of such shares. Upon this point Knight Bruce, V.C., said, "As to the five shares they stand on a somewhat different footing. It appears, as I understand it, that, as to these five shares, the testator had not executed the deed of covenant, but that he bought them, before the passing of the act of parliament, from a person who in respect of them had executed the deed, and that when the act of parliament passed, he became the registered proprietor of them. If there was otherwise no liability under them, I suppose that by the mere force of law or equity, or both, where a person who had executed the deed in respect of certain shares, and sold those shares, or all his right in them, it must be taken to be part of the contract that the vendor should be indemnified from all liability belonging to those shares in respect of calls. If this be so, substantially the contract on the part of the testator who bought these shares was to indemnify those personally liable to the company upon them. By analogy, if a man takes an assignment of a lease, without express contract, it is understood that he takes the liability to indemnify the assignor from liability in future with respect to the covenants. If that be so, the liability, though not in the same form or mode, is substantially the same with respect to the five as to the twenty-five. If this be so, and I am right in my view, the same rule must apply to both; and as the calls on the five so the calls on the twenty-five must be paid."

ASSIGNMENT OF A FELLOWSHIP AS A SECURITY FOR A DEBT.

Fiestel v. King's College, 11 Jurist, R. C. 506.

WE lay before our readers the substance of Lord Langdale's judgment in this case, not because it unfolds any new principle in courts of equity, or is illustrative of any peculiar application of existing rules, but because it refers to a question in which the public may be considered to be interested, and possesses moreover the attraction of being, so far as we know, the only case upon the subject.

The Reverend L. Buller, Fellow of King's College, Cambridge, mortgaged by indenture the emoluments of his fellow-

ship as a security for 300*l.* advanced to him by the plaintiff. The deed contained a power of sale in case of non-payment of the 300*l.* and interest on a certain day, with ample powers to the plaintiff personally to receive and get in the income of the fellowship. Notice of this assignment was given to the bursars of the college; and the money not being paid at the time appointed, the plaintiff required them to pay the share of the college income, awarded to Mr. Buller, to him in satisfaction of his debt and interest. This they refused to do, whereupon plaintiff filed his bill against Mr. Buller, the college, and the bursars, seeking to have his debt and interest paid out of the income of the fellowship. There were two points insisted on by way of defence, to which we are desirous to direct attention. It was urged the security was void, because the emoluments of the fellowship were of uncertain amount, varying from year to year, though it was admitted that the fund divisible at the end of each year amongst the fellows was distributed in ascertained proportions. Upon this point the court was of opinion that there was nothing in the nature of the income of a fellow of the college which rendered it unassignable in equity by reason of its being an uncertain annuity. Next it was contended, and this was the more important objection, that the assignment was derogatory to the intention of the founder of the college, and therefore void, as contrary to the principles of public policy which directed such intention to be observed. The answer given by the court to this objection will be best understood in the language of the judgment:—"The question is here, whether there are any such duties incident to the situation or office, as it is called, of a fellow, as to make the assignment of the income contrary to public policy. The assignment may be contrary to the implied intention of the founder of the college, contrary to the spirit of the statutes, which are the exponents of the intentions of the founder, and may therefore expose the assignor to consequences very unpleasant to himself, and very injurious to those who have dealt with him on the faith of his assignment. It may be a violation of his duty to the college, and very reprehensible, without being on that account void or contrary to public policy The easy duties which are annexed to the fellowship are duties which seem to be intended for the purposes and benefit of the college, and not for the public, otherwise than in a secondary and remote sense; the defendant himself distinctly admits that the office, situation, or post of senior fellow, now held by him, is not an office in any way connected with the administration of justice, or an ecclesiastical office of any nature or character. There is

nothing in this case which appears to me in any degree to resemble any of the cases in which assignments of income have been held void on the ground of public policy I do not propose to interfere in any way with the internal management of the college, with their authority over individual fellows, or the dividends they may apportion in respect of any fellowship. I am only to consider the dividends they may at this time or hereafter apportion to Mr. Buller. It appears to me Mr. Buller has effectually assigned such dividends as may be apportioned to him, and that there is no sufficient reason to induce this court to abstain from giving effect to such assignment; and therefore I must order, that for the purpose of paying what is due to the plaintiff, the sums of money which already have been, or may hereafter be apportioned to Mr. Buller in respect of his fellowship, shall be applied in or towards satisfaction of the plaintiff's demand, and the necessary account must be taken."

COMMON LAW.

RAILWAY DEPOSITS—RIGHTS AND LIABILITIES OF ALLOTTEES.

Wontner v. Sharip, 11 Jurist, C. B. 373; *Woolmer and others v. Toby*, 11 Jurist, Q. B. 426.

IN the first of these two cases an action was brought by an allottee of shares in an abortive railway scheme, against a managing committee-man to recover back plaintiff's deposit; in the second, the committee of management were the plaintiffs and an allottee defendant, against whom payment of deposit was sought to be enforced.

In *Wontner v. Sharip*, the state of facts, so far as they are material, stood thus:—a prospectus was issued, stating the capital to be £3,000,000, in 120,000 shares of £25 each, and that if the sanction of parliament was not obtained, the deposits, after deducting preliminary expenses, would be returned. The plaintiff applied for shares, and they were allotted to him "on condition" that he paid the deposit on a certain day, in default of which the allotment would be forfeited. The letter of allotment followed the prospectus in its statement of the amount of capital. Before the time of payment an advertisement was published by the managing committee, in which they gave notice that the allotment was completed, and stated as an apology to

those whose applications were passed over, the necessity of giving the preference to applicants locally interested. There was evidence the plaintiff saw this advertisement. He afterwards paid the deposit and signed the subscription deed; by which deed the committee were empowered to defray expenses out of the subscriptions. In fact, 58,000 shares only were allotted, although 120,000 had been applied for. It was found there were no funds left to go to parliament with, and in consequence a meeting was held, at which the plaintiff moved as an amendment to a resolution to allot further shares, that existing subscribers be reimbursed their deposits. The scheme was subsequently abandoned, and under these circumstances the plaintiff claimed to have his deposit money returned. At the trial the jury found that the advertisement was a fraudulent misrepresentation, and a material inducement to the plaintiff to pay his money; that the consideration had failed, the company being at an end; and that the deed executed by plaintiff was so executed under the same belief which operated upon his mind when he paid the money. After lengthened argument, the Court of Common Pleas gave judgment for the plaintiff. The court were of opinion, 1st, the letters of application and of allotment did not, when taken together, constitute a binding contract on the plaintiff to pay the deposit, and such payment therefore could not be ascribed to any legal liability. 2ndly, the advertisement *was* such a fraudulent misrepresentation as might well have induced plaintiff to pay and afterwards to sign the deed. 3rdly, the part plaintiff took at the meeting was no waiver of the fraud. As to the first point, that there was no previously binding contract to pay, it is said, "The plaintiff had applied for sixty shares in a concern which was to have a capital of £3,000,000, raised by the issue of 120,000 shares. The committee allotted to him a very different thing, but professed to allot that which he had asked for, and the letter of allotment as well as the prospectus described the capital at £3,000,000, the number of shares 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of £3,000,000, but absurd to suppose it would be accomplished for less than half that sum. The plaintiff having asked for shares in a practicable scheme, received shares in one that was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000 shares, although more than the whole 120,000 had been applied for by responsible persons; that which was allotted not being in truth what the plaintiff asked for, he was not bound to take it. Again, the allotment was not absolute but conditional, and on that ground

also we think the application and letter of allotment do not constitute a valid contract, the letter of allotment not being a simple acceptance of the plaintiff's proposal." Upon the question of fraudulent misrepresentation, the finding of the jury is confirmed. "If we are to construe the advertisement, we think it means all the shares had been allotted, and as a public advertisement at least it must be taken to have been addressed to all who were interested in the subject-matter, of whom the plaintiff undoubtedly was one. To him it represents that he had got what he asked for, sixty shares of the 120,000 in the proposed adventure; the jury therefore were well warranted in finding the representation so made was a material inducement to the plaintiff to pay his money." With regard to the supposed waiver of the fraud in plaintiff's attending a meeting after discovering that 58,000 shares only had been allotted, we are told, "The only act done by the plaintiff at that meeting was to propose that in consequence of the allotment of only 58,000 shares, all the deposits should be returned; and the argument comes to this, that having tried to induce others to join him in claiming the deposit, and, failing in that attempt, he shall not be permitted to do so by himself. No such doctrine is to be found in *Campbell v. Fleming* (1 Ad. & El. 40), or in any other decided case that we are aware of. The plaintiff did not act at the meeting or afterwards, showing his assent to be treated as a holder of sixty shares."

In *Woolmer and others v. Toby*, the position of the parties to the record was reversed; the managing committee in some other railway concern were now plaintiffs, and sought to render allottee liable upon letters of application and allotment, which they contended amounted to a binding contract on defendant's part to pay his deposit. In this case there was a body of provisional directors, with power to add to their number, seven of whom, the present plaintiffs, were chosen to act and did act as a committee of management. The defendant's application for shares was headed, pursuant to the form given in the prospectus, "To the Provisional Committee of Management," and a letter of allotment from that body, in the name of the secretary, was sent in answer, informing defendant that scrip would be given in exchange upon producing the letter and receipt at the foot of it, which receipt was first to be filled up by a banker to whom the deposit money was directed to be paid, and ran in this form, "Received on account of the Provisional Committee, of &c." Between the time of application and date of allotment a change took place in the list of provisional directors, but the committee of management remained the same. Out of these

facts arose the question upon which alone the court gave judgment (though some collateral points were much argued, and also adverted to from the bench), whether plaintiffs had proved the contract declared upon, to be made *with them*. Denman, C. J., in delivering the judgment of the court, said, "On the part of the defendant it was contended, that his application for shares was made to the general body, and sent to the committee of management as a part of that body appointed for convenience of communication, but not as having separate rights or powers; and to support this he argued that applications to be admitted to a joint undertaking would be swayed by considering who were joined therein; and that in this case between the application and allotment some names had been withdrawn from the provisional committee and some had been added; and that after this change, which may have materially altered his view, he ought to have the option of taking or refusing the allotted shares. Upon considering these facts, we think that the plaintiffs have not proved the defendant's contract to have been made with them, and that a nonsuit ought to be entered."

To consider for one moment the effect of these two cases as regards the question—purely a question of law—of contract or no contract. The latter case it will be seen decides, that assuming that question in the affirmative, still the managing committee are not the parties to bring the action, and further indicates that a change in the list of provisional directors, between application and allotment, would be fatal to any right of the latter to sue. Now, the decision in *Wontner v. Sharip* rests principally upon the ground of fraud, yet it must be remembered, had the court there been of opinion in favour of the validity of the contract, the defendant would have been entitled to a new trial, which was refused. It seems therefore, as regards that point, it is a direct authority for saying, that if in a concern professing to have a certain amount of capital to be raised by the issue of a certain number of shares, a quantity of shares are kept back by the committee, and the scheme is thus become an impracticable one, in such case a partial allotment is in law no allotment at all, the party not getting what he applied for; and further, that in any case when the application is absolute, and the allotment "on condition," no obligation to accept the shares or to pay the deposit money will arise. Another decision upon this latter point has since taken place, from which it would appear generally that where the letter of allotment is not a mere acceptance of the proposal, no contract is constituted. *Vollans v. Fletcher*, Law J. vol. xvi. N. S. Exch. p. 173.

**DELIVERY OF ATTORNEY'S BILL FOR CONVEYANCING BEFORE
ATTORNEY AND SOLICITORS' ACT—CONSTRUCTION OF THAT
ACT.**

Brooks v. Bocket, 16 Law Journ. Q. B. 178.

BEFORE the statute 6 & 7 Vict. c. 73 (the 22d of August, 1843), an attorney's bill, when for conveyancing only, was not taxable. The words of the 37th section of that act are, "That from and after the passing of the act no attorney, &c. shall commence any action for the recovery of any fees, charges or disbursements, for any business done by any such attorney, &c. until the expiration of one month after such attorney shall have delivered unto the party to be charged therewith, &c., a bill of such fees, &c., and which bill shall either be subscribed with the proper hand of such attorney, &c. or be inclosed in or accompanied by a letter, subscribed in like manner, referring to such bill."

In *Scadding v. Eyles* (15 Law J. Q. B. 364), it was decided that this section was retrospective in its operation, and applied to business done before as well as after the passing of the statute.

In *Brooks v. Bocket* the attorney's claim was for conveyancing, and a bill thereof, referred to in a signed letter accompanying it, was delivered more than a month before action brought, but before the passing of the above statute. It was admitted in the judgment that here there had been a *literal* compliance with the words of the act; yet as its object in requiring a delivery was that taxation might be had, if the party charged desired it within one month, and the delivery of a conveyancing bill before the statute could not have that effect, for at the time of delivery such a bill was not taxable, therefore it was holden the delivery here was not such as satisfied the requisitions of the statute. "However, we might hold," said the Court, "as to the effect of a delivery before the statute, in the case of a bill then taxable (as to which we say nothing), we should be entirely defeating the retrospective operation of the 37th section, if we were to hold such a delivery effectual in the case of a conveyancing bill. It may be that in the case of a taxable bill, the delivery may come within the operation of the saving in the 1st section—as being a thing done before the passing of the act.' The delivery here cannot be within that saving, because it was not within or done under any of the repealed statutes." The judgment, likewise, is explicit upon the point, that in an action upon an attorney's bill, the plea of no bill delivered is a good answer to an account stated.

SMALL DEBTS ACT—ORDER OF COMMITTAL—NECESSITY OF SUMMONS TO DEBTOR.

Ex parte Kining, 16 Law Journ. Q. B. 257.

DOWN to a recent period in our law, a creditor who obtained judgment could always take the body of his debtor for the amount of his debt and costs. But by the 57th section of 7 & 8 Vict. c. 96, it was provided that if the debt did not amount to 20*l.* the debtor should not be liable to be taken. This state of the law being complained of as inflicting hardship upon small judgment creditors, the Small Debts Act, 8 & 9 Vict. c. 127, was passed. The 1st section of the last-mentioned act provides that a person indebted to another in a sum not exceeding 20*l.*, on a judgment or order of court, may be summoned before an inferior court, and may be examined with reference to contracting the debt and his means of satisfying it, &c., and that it may be lawful for the court to order payment thereof by instalments; and in case the debtor should not attend or give satisfactory answer, &c., *or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the court shall order*, then the judge of such court may order such debtor to be imprisoned for any time not exceeding forty days: whilst by sect. 3 such imprisonment shall not operate in extinguishment or satisfaction of the debt.

Ex parte Kining is a case which arose upon the construction of this act. It illustrates and confirms a great principle in our law, that no one shall be deprived of his liberty without being first heard in his defence. A judgment debtor for a sum under 20*l.* was summoned under the act, and upon his appearing an order was made by the court for payment of the debt by monthly instalments; he failed to pay the first instalment, and he was at once committed under a warrant, upon which it did not appear that the debtor, since the making of the order for payment, was either summoned or had notice previous to the issuing of the warrant; on the ground of this omission the Court of Queen's Bench were moved for his discharge. Lord Denman, C. J., and Erle, J., thought the warrant good. They held the issuing of the warrant to be a mere ministerial act, and agreed with Mr. B. Alderson in Ex parte Foulkes (15 Law J. N. S. Exch. 300), in considering the intention of the act was to give a limited *capias ad satisfaciendum*, which must be considered as in full operation from the time of making the order for the payment of the debt by instalments, and authorizing an imprisonment for forty days, subject however to

reduction if anything should come to the knowledge of the court to justify such reduction. Application was then made to the Common Pleas, where the whole court took the same view as Patteson and Coleridge, Js. had already done, being unanimously of opinion that the warrant was defective for the omission above stated. They laid it down that the ordering of commitment was a judicial and not a ministerial act, as it was the duty of the judge first to inform himself of the circumstances under which default was made, and then to limit the time of imprisonment accordingly; and that therefore, according to general principles, it could only be done after first summoning the party best acquainted with those circumstances, and hearing what he had to say in his defence. It was pointed out that imprisonment under this statute was inflicted simply by way of punishment, and not in satisfaction of the debt. Therefore the non-payment of the instalments which the party had the means of paying when they became due, constituted the offence in the present case, and to commit the party in consequence, without his having been heard thereon or notice given of the same, would upon general principle be contrary to the laws of England and natural justice. Thus we see, though the statute did not expressly direct the issuing of such a summons, still as it said nothing upon the point, general principle dictated the rule, and the prisoner was accordingly discharged.

This decision is of great public importance, for it is equally applicable to the County Courts' Act, 9 & 10 Vict. c. 95, now at work throughout the country, as to the statute upon which it actually arose. By section 92 of the County Courts Act power is given to the judge of the court to order payment by instalments of any debt, damages or costs, for which judgment shall be obtained in such court. By section 94 a similar power of commitment to the one already considered is given in case of default. It is therefore now clear that under this act, where there is a simple order to pay by instalments, and default is afterwards made, a warrant of commitment will not issue as a matter of course, or upon an *ex parte* application, but the debtor must be first summoned, that he may have the opportunity to excuse his default. The practical importance of this decision is still more apparent when we consider that in very many instances, under the County Courts Act, there is no dispute between the parties as to the debt being due, but the plaintiff brings the case into court for the sole purpose of getting the mode and time of payment of his demand fixed under judicial sanction.

LANDLORD AND TENANT—LEASE—ASSIGNMENT.

Pollock and another v. Stacey, 16 Law Journ. Q. B. 132.

THAT a lessee who parts with all his interest in premises, at the same time reserving rent to himself, but without deed as required in all cases of *assignment* by 29 Car. II. c. 3, s. 3, and 8 & 9 Vict. c. 106, s. 3, can maintain an action for the rent reserved, is a point which has been recently discussed and decided. Such a transaction no doubt often occurs, and the construction to be put upon it is a matter deserving of notice. The plaintiffs, who were tenants of certain premises from May till the 13th of December, let them by parol to defendant up to that day, reserving to themselves a weekly rent; rent was paid accordingly by the defendant for the first week, when he gave a week's notice to quit, and afterwards left in pursuance of the notice. If such parol agreement amounted to a lease, the present action, which was for use and occupation for the rent due for the remainder of the time, was maintainable; but if on the contrary it was by construction of law an assignment and not a lease, on the ground that the plaintiffs parted with their whole interest in the premises, as an assignment it would be void, not being by deed, and the plaintiffs would have no right of action. The court, in delivering judgment, said, "We are of opinion that the plaintiffs are entitled to recover. The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease; this they were at liberty to do by law, and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only; and we should construe that which was expressed and intended to be a lease, to be an assignment only, *ut res pereat*, which is against a known salutary maxim. In *Poulteney v. Holmes* (1 Stra. 405), a lease of all the lessor's interest was supported as a lease." Other authorities are then minutely alluded to, and the judgment concludes, "Upon this review of the authorities we do not consider that the case of *Poulteney v. Holmes* has been over-ruled. As to other cases cited, viz. *Parmenter v. Webber* (8 Taunt. 593), and *Smith v. Mapleback* (1 T. R. 441), they decide that such a lessor cannot distrain, not having any reversion: this is not disputed, but the negation of the right to distrain does not at all imply a negation of a right to sue for use and occupation."

case as this there was no agency, for the assignee could not let out the insolvent to hire or contract himself for his personal labour. This view was adopted by the court, who would not allow that the assignee of an insolvent could sue for the price of the personal labour of the insolvent after the insolvency, as a debt due directly to the assignee himself upon a contract made with him.

This decision ensures to an uncertificated bankrupt the same result, viz. that his assignees have no right to deprive him of the means of subsistence by seizing the profits of his personal and daily labour after bankruptcy; for certainly the words of the 63rd section of 6 Geo. IV. c. 16, are not more comprehensive than those of the section of the act relating to insolvency, upon which the present judgment turned.

PLEADING.

DETINUE.

Clements v. Flight, 16 M. & W. 42.

THIS was an action of detinue for scrip certificates. The defendant pleaded that they were deposited with him as a pledge and security for a sum of money advanced by him to plaintiff, and that on payment by plaintiff of that sum, he tendered and offered to deliver them up to the plaintiff, who then refused to receive them. This plea was demurred to, and the main point was, whether the plea was not an argumentative denial of the detention alleged in the declaration. The question therefore turned upon the meaning of the word "detain" in an action of detinue. Pollock, C. B., in delivering the judgment of the court said, "If it mean that the defendant withholds the goods and prevents the plaintiff from having the possession of them, the plea denies the detention argumentatively, and is bad. We are satisfied that this is the true meaning of the word 'detain.' If it meant the mere keeping a possession, not adverse, how could such a possession form the ground of an action? If it meant that the defendant had omitted and still omitted to be active in bringing the goods to the plaintiff, the action could not be maintained without showing an obligation by contract to do so. We have no doubt therefore that the detention com-

plained of is an adverse detention. * * * We think therefore that the plea is bad as amounting to 'non detinet.'"

In reference to another ground of demurrer, the judgment confirms the case of *Whitehead v. Harrison*, 6 Q. B. 423, upon the point that any special bailment laid in a declaration of detinue is merely surplusage, and not traversable, the gist of the action being the detainer of the plaintiff's goods, which the defendant is called upon to answer.

BANKRUPTCY.

EXECUTION CREDITOR AND ASSIGNEES OF BANKRUPT—RIGHTS UNDER STAT. 6 GEO. IV. c. 16, s. 108, WHERE A FIRST EXECUTION ON A JUDGMENT ON A WARRANT OF ATTORNEY IS SET ASIDE.

Graham and others, Assignees, &c. v. Witherby and another, 7 Q. B. 491.

It appeared the bankrupt's goods were first seized under a writ of execution upon a judgment on a warrant of attorney. Whilst the sheriff was in possession under this writ, there came to his hands a second writ of execution, issued upon a judgment obtained in a hostile *bonâ fide* suit, and without notice of any prior act of bankruptcy. The goods seized were of inadequate value to satisfy the first writ; and after seizure and before sale a fiat in bankruptcy issued. According to *Whitmore v. Robinson*, affirmed in the Court of Error in the case of *Skey v. Carter*, 11 M. & W. 571, an execution founded on a warrant of attorney is within the operation of the 108th section of the 6 Geo. IV. c. 16, and not protected against the effect of a fiat before sale. The first process was therefore set aside by this statute. Upon this, the question arose,—whether the now defendants, the execution creditors under the second writ, were entitled to the proceeds of the goods in satisfaction of their writ, which having been issued upon a judgment in an adverse action, was not within that section, or whether the plaintiffs, the bankrupt's assignees, were the parties entitled. This depended upon the effect given to the 108th section,—whether it set aside the first execution wholly, or only to the extent of transferring the proceeds thereof to the assignees. It was obvious that but for the bankruptcy the present defendants would have taken nothing, because, as already stated, the goods seized would have been

wholly swallowed up by the first writ; nor was it doubted that the object of the section manifestly is, to compel the creditor, who had seized under an execution upon a judgment by virtue of a warrant of attorney, to relinquish that seizure, and to bring the proceeds into hotchpot for the benefit of *all* the creditors, and not to give to a second judgment creditor a preference which he had not at common law. But however much the court, in determining the question before them, were disposed to carry out such a construction, they held they could not do so, since the case of *Goldschmidt v. Hamlet* (6 Man. & Gr. 187), and more especially the case of *Cheston v. Gibbs* (12 M. & W. 111). In this latter case the Court of Exchequer, after mature deliberation, decided that the 108th section affects the writ itself; and according to the rule of law there distinctly laid down, the writ on a judgment upon a warrant of attorney becomes void by the issuing of the fiat, so that the assignees may maintain *trover* against the sheriff if he sells under it, on the ground that, as the writ is void, the goods remain the goods of the bankrupt, and so pass to his assignees. The bearing of that decision upon the circumstances of the present case, where there was a second valid writ in the hands of the sheriff at the same time, chiefly guided the judgment of the court. "The sheriff, then, was bound to treat the first writ as void when the fiat issued; and the moment he so treated it, the writ of the now defendants, which had attached provisionally on the goods, and which was not void under the 108th section, but valid against the assignees and all the world, became absolute, or, so to speak, the first writ; and the now defendants were entitled to be satisfied out of the proceeds of the goods." Judgment for the defendants accordingly.

Short Notes of New Books.

Commentaries on the Law of Suretyship and the Rights and Obligations of the Parties thereto; and herein of Obligations in Solido in England, &c., and on the Continent. By William Burge, Q. C., of the Inner Temple, Esquire, M. A. London: William Benning & Co. 1847.

MR. BURGE has herein contributed a valuable work to jurisprudence. This book is no mere compilation. It is a well written and methodised treatise on the laws of suretyship; and forms a valuable addition to the researches of Story, whose writings those of Mr. Burge in some material respects resemble. It is fitting to allow Mr. Burge to speak of his design in writing the book in his own words. He says—

“ The plan of this work, in combining the civil law and the jurisprudence of other countries with the law of England, has been adopted by me, from the conviction that it affords the best means of explaining, understanding, and applying that law. If the execution of that plan shall in any degree confirm and promote the disposition which now prevails, to make general jurisprudence a branch of the education of a candidate for the bar, I shall have evinced my deep interest in, and my sincere attachment to, a profession in which my life has been passed.

“ It will be perceived that in treating of the constitution and form of the contract of suretyship, and the rights and obligations of the parties to it, and of their extinction and discharge, many of the rules and principles were equally applicable to contracts in general.

“ The law relative to obligations *in solido*, or joint and several obligations, in some respects so much resembles, and in others is so essentially distinguished from the law relative to suretyship, that this work would not be so complete as it ought to be if it had been omitted.

“ It was necessary to treat of certain parts of the bankrupt law, for the purpose of showing the effect of the bankruptcy of the principal or surety on the rights and obligations which were derived from the contract.

“ As the law of England differs in many respects from that of other countries, both as to the nature, constitution, and form of the contract of suretyship, and of the rights and obligations of the contracting parties, as to the extinction and discharge of those rights and

obligations, and on the effect of bankruptcy, it was a necessary part of this work to treat of the particular law which in these cases of conflict should be adopted."

Mr. Burge writes in an easy style, and has a happy facility of sifting his matter, and producing all the grain without the chaff, which usually encumbers the productions of a less disciplined mind. His work extends through every branch of the law of suretyship. The following extract affords a specimen rather of the research and lucidity of the work than of the literary ability of the author. It relates to "Alterations of Contracts."

"An alteration in the obligation or contract in respect of which a person becomes surety, extinguishes the obligation and discharges him, unless he has become by a subsequent stipulation a surety for or consents to the contract so altered. 'Finiri dicitur obligatio fidejussoria ob alterationem obligationis sive contractûs, pro quo fidejussor fidem suam interposuit, fidejussorem non teneri ex novo contractu, nisi denuò intercedat per interpositam stipulationem.'

"Any subsequent addition to, or deviation, or abstraction from the contract, is such an alteration as discharges the surety. Thus, if the buyer and seller agree after the contract of sale to increase or reduce the price originally agreed on, they recede from the original contract, a new contract is substituted, and the surety, whose obligation was in respect of the original contract, is no longer bound. 'Mutato enim pretio, ex quo consistit substantia, status et natura emptionis, et emptio mutatur.' If the buyer and seller alter the subject-matter of the sale, as, if the goods originally delivered are returned, and others are purchased for the same or a greater price than that for which the original goods had been sold, the surety is discharged. 'Alterantur autem revera initii contractus, quando postea, vel incontinenti, vel ex intervallo, per certa pacta illis quidquam vel adjicitur vel detrahitur. Quod si igitur venditor et emptor post emptionem paciscantur, de minuendo, vel augendo pretio, recessum est à priori contractu, et nova emptio intercessisse videtur, ideoque fidejussor, qui pro priore contractu intercesserat, amplius non tenetur. Idem est, si postea venditor et emptor merces alterent, et recepta merce priùs vendita alia pro eodem, vel majore pretio ematur, ut enim pretium, ita et merx de substantia est emptionis, et venditionis."

"The surety's liability, when the contract is for letting and hiring, *locatio et conductio*, will also be discharged, if any increase or diminution of the rent is subsequently agreed on, or any change of the subject hired. 'Alterato contractu per locatorem, licitum esse fidejussoribus ab illo recedere, eoque minimè obligatos esse."

"The right of the surety to resist any claim which the creditor may make against him, founded on the contract and to insist on his discharge, may be repelled on the same ground as that on which the performance of any other contract may be resisted, namely, that it is not the contract into which he had entered.

"If there be any variation in the contract, made without the surety's consent, and which is in effect a substitution of a new agreement, although the original agreement may, notwithstanding such variation, be *substantially* performed, the surety is discharged."

We can honestly recommend this book to the profession.

Manual of the Law of Scotland. By John Hill Burton, Advocate, Author of a Treatise on the Law of Bankruptcy, Insolvency, and Mercantile Sequestration in Scotland. Second edition. Edinburgh: Oliver and Boyd. 1847.

THE profession is already indebted to Mr. Burton for several very valuable works on the laws of Scotland. The one before us is the most comprehensive of that production. There are two volumes; one of which treats of "The Law of Private Rights and Obligations," and the other of "Public Law; Legislative, Municipal, Ecclesiastical, Fiscal, Penal and Remedial; with a Commentary on the Powers and Duties of Justices of the Peace and other Magistrates." Both works are admirably written, and afford to the student and the practitioner ample information, written in a lucid style and evincing vast research.

Familiar Exercises between an Attorney and his Articled Clerk on the general Principles of the Laws of Real Property. By Francis Hobler, Jun., Attorney-at-Law. Third edition. London: William Benning & Co., Law Booksellers, Fleet Street. 1847.

A VERY useful and well digested little work in a catechetical form.

The Practice of the High Court of Chancery, as regulated by the General Orders of the 8th of May, 1845. Edited by John Rogerson, a Solicitor of the Court. London: S. Sweet, 1, Chancery Lane, Fleet Street. 1847.

THIS work is carefully done, and we doubt not will be useful to all practitioners in the Court of Chancery.

"The present work," says the author, "as its title imports, is strictly confined to the practice of the Court of Chancery under the Orders of the 8th of May, 1845.

"The important changes effected by these orders entitle them to a separate treatise; and, indeed, they may be more conveniently referred to and considered in that form.

"It was the author's original design (and in which he progressed to some extent) to have embodied the orders in the text; but upon consideration it was deemed advisable to give the orders in a distinct and conspicuous form, as enabling the practitioner more conveniently to consider their effect, with a view to adopting his own construction thereon.

"The work is intended as ancillary to the well established treatises

on the practice of the court by Mr. Daniel, Mr. Smith, and Mr. Grant.

"There is now a vast body of cases decided on the construction of these orders, of the most vital importance to the practitioner, which have not yet found their way into any book of practice; these cases are cited in the notes to each order, as they are in any manner applicable thereto.

"The author has endeavoured to embody such cases decided upon the abrogated orders as are applicable to the portions of such orders introduced in the existing orders.

"Reference is made in the notes to each order to such other orders as affect in any manner the particular order. In following out this plan an apparent prolixity may suggest itself to the reader, but the intention to give the practitioner an immediate reference was the object of the author."

The Practice of Conveyancing; comprising every usual Deed, analytically and synthetically arranged. By James Stewart, of Lincoln's Inn, Esq., Barrister-at-Law, and Harris Prendergast, of Lincoln's Inn, Esq., Barrister-at-Law. Third Edition. London: W. Benning & Co., Law Booksellers, 43, Fleet Street. 1847.

THIS is the second part of the same work of which we formerly reviewed the first part. It appears to be revised and augmented with great care and industry.

The Law and Practice of Marine Insurance, deduced from a critical Examination of the adjudged Cases, the Nature and Analogies of the Subject, and the general Usage of Commercial Nations. By John Duer, LL.D., one of the late Revisers of the Statute Laws of New York. Second vol. New York: John S. Poorhies. 1846.

THIS is the work of a very able American lawyer. It exhibits great research and ability.

Draft of an Act of Parliament, consolidating the whole Statute Law in one Act. London: Butterworth. 1847.

WE are in some doubt whether this is intended as a burlesque on legislation, or whether it is an honest effusion of some simple hearted marvellously puzzle-headed man. The Act contains 494 sections on

every conceivable subject of legislation from the Admiralty to the Poor Laws. It begins with the following comprehensive clause:

"1. At the expiration of six months after the passing of this act, unless hereby otherwise provided for, all the public general statutes which were in force within the realm at the end of the year 1846 shall be repealed, except so far as they repeal other statutes or abolish any custom or practice, and except also as any statutes are hereby expressly excepted."

Yet in a multitude of the succeeding enacting clauses we find things directed to be done according to the law in force before the passing of this Act. How those regulations are to be ascertained or enforced, after all the statutes providing for them are repealed, it is impossible to guess. Here is an instance.

"92. Prelates shall have like remedies for injuries done in the time of their predecessors, as they might have had before the passing of this act."

Thus the Act proposed would perpetuate in most cases all the old machinery and cumbrous legislative provisions, merely depriving them of all power of being worked or taking effect.

The author's notions of public liberty may be gathered from sections 72 and 73. They are really entertaining. We give them verbatim.

"72. No meeting of any number of persons for any public purpose, whether held in any house or in the open air, shall be deemed lawful, unless it be presided over by some duly authorized person, and the same shall be convened by such person in pursuance of a requisition signed by not less than twelve persons of honest repute."

"73. If any person attempt either by speech or writing to inflame the public in any manner or on any matter of public interest whatever, he shall at the instance of any person be taken before a justice, and on proof of the fact, the said justice may require him to give security for his good behaviour; and if he have offended by means of any written or printed matter he shall be compelled to deliver up all copies of the same, to be destroyed under the direction of such justice, and in case of default shall be committed to prison until he has complied with the requisition."

Events of the Quarter.

DANIEL O'CONNELL, Esquire, died on Saturday, the 15th of May last, at Genoa. In our next Number a Memoir of him will be published. It is a singular circumstance that two gentlemen, one in Dublin the other in London, who were to have written the Memoirs, were both successively seized with severe illness. The paper was half finished in the latter case.

Sir David Pollock, Chief Justice of Bombay, has fallen a victim to the climate. His death is announced by the last Indian mail. He was the eldest brother of Sir Frederick, the Chief Baron of the Exchequer, and Sir George, the Indian General. He was born in 1780, and was educated at Edinburgh College. He was called to the bar in 1802; attained to considerable practice; was appointed a Commissioner of Insolvents about four years ago, and Chief Justice of Bombay in 1846. He was much esteemed for his personal worth, and was a man of kind heart and of exemplary morals, revered for his domestic virtues, and universally respected alike by the profession and a wide circle of private friends.

Death has already removed one of the new County Court Judges. Mr. David Leahy died on Monday, the 21st of June last. He was a man of great ability, but not of an order which fitted him for success at the bar, or for judicial functions. He is succeeded by Mr. Chilton, Q. C., in the judgeship of the Greenwich and Lambeth Courts, whose mode of exercising judicial powers is illustrated in the Law Times of July 24th last. We shall have to make further comment on this matter.

Mr. Rawlinson, the Police Magistrate of Marylebone, is dead, and is succeeded by Mr. Hammell, who has, we believe, held some judicial office in the colonies.

Parliament was dissolved on the 23rd of July, 1847, having lasted nearly seven years. The new parliament will meet earlier than usual.

The Commissioners on the Law of Marriage have intimated that they are willing to receive communications relative to marriages within the prohibited degrees, and that communications shall be deemed confidential if the parties so wish. We shall discuss this subject in our next number.

A broil at the Chancery Bar between Mr. Bethell and Mr. Cooper took place a fortnight ago. A pamphlet was published, the topic became public, and the Attorney General, having been appealed to, with great propriety and judgment convened a Bar Meeting, and the matter was arranged by qualified apology and retraction of the pamphlet.

Correspondence.

THE REAL PROPERTY AMENDMENT ACT, 8 & 9 VICT. c. 106, s. 3.

IN our article on this act, vol. 3, N. S. p. 252, we stated the effect of the section requiring leases, &c. to be by deed, to be that "any instrument not under seal, though in terms which would hitherto have amounted to an undoubted lease, will for the future operate only as an agreement for a lease." This is not strictly the effect of the clause: there is yet a class of leases which will be valid whether in writing or not, and therefore derive no extra validity from being under seal. The class of leases which the section makes void unless by deed is such *as by law are required to be in writing*. The effect will be to comprise all leases except those which by the statute of frauds were allowed to exist by parol, that is to say, all leases not exceeding the term of three years from the making thereof at two-thirds of the full improved value of the thing demised." As such leases were clearly not required *by law* to be in writing, the late act will not interfere with them; and as they could exist without writing before the act they may of course still be effected, if desired, by simple contract.

Our attention has also been called to the terms of the same section, which declares that the instruments referred to shall be "void at law" unless by deed. It is suggested that the words *at law*, if they have no meaning, exemplify the mischievous surplusage and redundancy of acts at the present day. If the instruments had simply been en-

acted to be void, all the presumed purposes in view would have been answered. We question whether it will not require a decision on the point as to an instrument, though void at law, being or not valid in equity. To justify the doubt the statute of frauds may be referred to as showing that the relief which equity can give against law should have been specially excluded (if intended), as it is by the first section of that act as to leases, &c. not in writing.

It is also suggested that the learning which has accumulated on the question as to what should be deemed an actual demise, or only an agreement to demise, cannot yet be laid aside, and the case is put in the words of our article of an instrument not under seal, which before the act would have amounted to an undoubted lease, say for seven years. Now if it be an undoubted lease, it is void at law by the terms of the act, and being void, can any effect be given to it under colour of its being an agreement to lease? If it cannot, then the great point will be, in cases where the instrument is not so clearly a lease, to contend, with the help of the numerous decisions on the subject, that it is only an agreement for a lease. Of course as to leases which we have shown may still exist without deed, the vexata quæstio, as to the distinction between agreements and actual demises, remains in full force.

The fourth section of the repealed act 7 & 8 Vict. c. 76, seemed on this head more clear than its successor.

It is noted as a curious instance of the legislative language of these times, that an act to *simplify* the transfer of property should have required a formal deed in lieu of a simple writing under hand.

G. H.

List of New Publications.

Commentaries on the Law of Suretyship, and the Rights and Obligations of the Parties thereto, and herein of Obligations in Solido, under the Laws of England, Scotland, and other States of Europe, the British Colonies, and United States of America, and on the Conflict of those Laws. By William Burge, of the Inner Temple, Esq., one of Her Majesty's Counsel, &c. In 8vo. price 18s. boards.

A Treatise on the Law of Fixtures and other Property partaking both of a Real and Personal Nature; comprising the Law relating to Annexations to the Freehold in general, as also Emblements, Charters, Heir Looms, &c.; with an Appendix, containing Practical Rules and Directions respecting the Removal, Purchase, Valuation, &c. of Fixtures between Landlord and Tenant, and between Outgoing and Incoming Tenants, by A. Amos, Esq. and J. Ferard, Esq., Barristers at Law. The Second Edition, by Joseph Ferard, Esq., Barrister at Law. In royal 8vo. price 16s. boards.

A Treatise on the Jurisdiction of the High Court of Admiralty of England. By Edwin Edwards, Esq., of Doctors Commons. In 8vo. price 10s. boards.

The Law of Domicil. By Robert Phillimore, Advocate in Doctors Commons and Barrister at Law. In 8vo. price 9s. boards.

Bills of Costs between Attorney and Agent, in the Courts of Queen's Bench, Common Pleas, Exchequer of Pleas, and Crown Office; shewing at one view Sets of Costs complete in themselves: also in Bankruptcy, Insolvency, Chancery, Conveyancing, Privy Council, Replevin, Sci. Fa., &c., with other Miscellaneous Bills, and a Copious Index. By E. W. Gilbert. Third Edition, considerably enlarged. In 8vo. price 16s. cloth boards.

The Law and Practice of Elections and Election Petitions, with all the Statutes and Forms. Third Edition. By Charles Wordsworth, Esq., of the Inner Temple, Barrister at Law. In 8vo. price 1l. boards.

The Law of Costs, as affected by the Small Debts Act, and other Statutes, requiring a Judge's Certificate where the Damages are under a limited Amount, with various Cases, showing in what Instances a Plaintiff may still sue in the Superior Courts. By Thomas Howard Fellows, of the Inner Temple. In 12mo. price 4s. boards.

Familiar Exercises between an Attorney and his Articled Clerk, on the General Principles of the Laws of Real Property, &c. By F. Hobler, Jun., Attorney at Law. Third Edition. In 12mo. price 6s. cloth boards.

Aids for Students of Conveyancing. By F. T. Sergeant, of Lincoln's Inn, Esq., Barrister at Law. In 8vo. price 5s. boards.

The Acts for Building and promoting the Building of Additional Churches in Populous Parishes, arranged and harmonized with a Preamble, Appendix and Index. By James Thomas Law, A.M., late Special Commissary of the Diocese of Bath and Wells. In 8vo. price 6s. boards.

A Treatise on the Law of Landlord and Tenant, with an Appendix of Statutes and Copious Index. By Charles B. Claydon, Esq., of Lincoln's Inn, Barrister at Law. In 12mo. price 10s. boards.

The Law of Qualification and Registration of Parliamentary Electors in England and Wales as settled by the Court of Common Pleas since the passing of the Statute 6 Vict. cap. 18, to the present Time. By David Power, Esq., of Lincoln's Inn, Barrister at Law. In 12mo. price 5s. boards.

The Statutes and Orders relating to Practice and Pleading in the High Court of Chancery from 1813 to Easter Term, 1847, classified according to the respective Proceedings in a Suit; with a Time Table and Notes. By Samuel Simpson Toulmin, Esq., of Gray's Inn, Barrister at Law. In 8vo. price 14s. cloth.

A Treatise on the Law of Leases, with Forms and Precedents. By Thomas Platt, Esq., of Lincoln's Inn, Barrister at Law. In 2 vols. royal 8vo. price 2l. 10s. boards.

The Practice of the High Court of Chancery as regulated by the General Orders of the 8th May, 1845. Edited by John Rogerson, a Solicitor of the Court. In 8vo. price 12s. 6d. boards.

The Law concerning Horses, Racing, Wagers and Gaming, with an Appendix containing recent Cases, Statutes, &c. By George Henry Hewit Oliphant, B.A., Esq., of the Inner Temple, Barrister at Law. In 12mo. price 7s. 6d. cloth.

Digest of the Laws relating to Bribery and Treating at Elections of Members to serve in Parliament and for the better Discovery thereof, illustrated by the Cases decided in the Committees of the House of Commons and Courts of Law, with an Appendix containing the Statutes. By James Cook Evans, Esq., of Lincoln's Inn, Barrister at Law. In 12mo. price 3s. boards.

A Treatise on the Law of the New County Courts, compiled from the Statute of the 9 & 10 Vict. c. 95, and the Common Law applicable thereto. By Joseph Moseley, Esq., Barrister at Law. Part 2. In 8vo. price 12s. boards.

THE
LAW MAGAZINE;
OR,
QUARTERLY REVIEW
OF
Jurisprudence.

ART. I.—SPECIAL PLEADING IN ENGLAND AND
SCOTLAND.

MUCH interest has of late been excited on the subject of pleading, not only in this country, but in Scotland, where a system, different in design and form from our English one, prevails; and a spirit of inquiry has been called forth, which, concerning itself more with the reason of the law than with its existing sanctions, may, it is hoped, in the end effect some great improvement in our system of judicature. We have already had occasion to remark on the views contained in Mr. Phillimore's recent publications; and while we could not go the length he does in the way of reform, we have admitted many defects, and undoubtedly there is much in the present state of things in our courts that is worthy of the serious attention of jurists and legislators. Viewed in every light, not only as it respects the well being and efficiency of the legal profession, but in relation to the many rights and interests of the various classes of our social community, the subject is of the last importance, and we ought to be circumspect and thoughtfully advised in attempting to deal with or innovate upon it. When we consider the antiquity of our English special pleading—the appeal which in its conception and design it makes to the justice of the country—and the constant unceasing application of its leading rules, and that too under a varying and extending law, we hardly feel invited to the work of change. *Consuetudo sermonis est consensus eruditorum*; but forms originally good and referable to sound principle may at length become the instruments of injustice and may corrupt the law; their continued utility may be disproved by experience, and the complicated relations of an enlarged and increasing society, creating

at every social turn and movement new rights—explicating, in their multiform aspects, interests the assertion and vindication of which was not and could not have been originally contemplated, much less provided for—seem at least to require the aids of a judicious analysis, such as experience affords, whereby we may extend the boundaries of established juridical science, so that the law itself may be better, that is, more certainly known, and more correctly, because more fully and comprehensively, applied. The idea of law pleading as a means of bringing litigants to a plain and simple issue, on which they are understood to ask the judgment of the court or the verdict of the jury, cannot be too much admired, but the present forms will, on examination, be found incommensurate with our jurisprudence, and therefore inadequate for the ends of justice. The law may be said to have outgrown its administration.

We know of no country where special pleading has been treated so much as a system of scientific allegation as in England. Other countries, especially such as, like Scotland, recognize the fundamental principles of the Roman law, may have finer systems of jurisprudence, but among us it may be allowed that the language of averment is better understood than it is elsewhere. And in any improvements or reforms in our method of pleading we would not touch the general design. So long as confidence can be placed in juries, nothing can be more admirable. It will stand every ethical test, and must commend itself to the serious thinker who desiderates the logical investigation of truth. Objections, however, have been taken to the manner of its working, and we must allow that in several important particulars the system must now be pronounced at fault. The body of the law has been added to, but with an advancing jurisprudence the rules of pleading have not kept pace. Old forms have been pertinaciously adhered to and made applicable to the case of the present day by the device of an assumed fiction. A degree of nicety and excessive precision, leading to an extreme and impracticable technicality, have been the consequence, to such a degree as virtually to give the rule to, instead of receiving the rule from, the law. But let us not be misunderstood. We do not depreciate precision of language or accuracy of style; we think juridical statements cannot be too clear, too severely precise, or too rigidly accurate; but we do object to such an absolute devotion to antiquated forms as would forget or supersede legal principle.

On the other hand the Scotch pleaders have, it is thought, gone to the other extreme, and have allowed to be introduced into their records a freedom of statement scarcely compatible with well digested practical law. Their forms of pleading are

nevertheless capable of giving a good trial, and are in some respects better and more complete than our own. But while there is much in their system which the jurist must admit to be improvements on the English method, it cannot, we think, be disputed that the formal design of the latter is the more scientific. The directions or rules which the Scotch judges have at different periods given by their *Acts of Sederunt*, as they are called, for the preparation of pleadings, illustrated as these have been by several excellent compilations on practice, particularly the useful work by the late Mr. Darling, are very admirable; and since the introduction of jury trial in civil causes into the judicature of Scotland, there has been given to the pleadings of that country a more distinct form than they formerly possessed. A new test has been applied, the general characteristics of the Scottish system have been more clearly developed, and it has now ascertained principles by which, as the late Lord Chief Commissioner Adam called it, the special pleading of Scotland in jury causes may be distinguished. But special pleading in the strict sense, or the science of juridical allegation, has never been treated in Scotland as in itself a separate branch of legal learning, with its own appropriate rules, principles and forms, nor have the Scotch studied exact verbal statement as a pure forensic art so much as we have. Their law works have chiefly been devoted to the elucidation of legal principle, and in this course of study they must be allowed to have succeeded. Perhaps the entire body of Scotch law now presents the most philosophical system of jurisprudence in existence. Its genius is seen to great advantage in what are called the *Session Papers*, or preserved records. Some of the argumentative pleadings (for there are such in certain cases according to the Scottish practice) in this valuable collection of legal writings are remarkable for the elegance and power of their composition. The old session papers are particularly distinguished in this respect; their argumentative contents, the productions of the Scottish lawyers of a former age, being in numerous instances perfect models of legal disputation. Founded upon the principles of the *Jus Civile*, the matured conclusions of the erudition of Rome, the Scotch law may be said to be the most interesting study in which the legal student could engage. The common law of Scotland is in principle more extensive than our own, and this is owing to the foresight and perspicacity peculiar to the sources whence the legal customs and judicial habitudes of the country have proceeded. The beneficial effect of this is seen in the comparatively few statutes that are passed for Scotland, the courts of which country are glad not to be embarrassed by the

unceasing legislation with which the English courts are visited. The Scotch lawyer would rather work out a legal principle than interpret a modern act of parliament, and generally the system that prevails in the North encourages more a free examination of the law and its reasons, than a rigid adherence to the unbending technicality of prescribed form. The Scotch courts accordingly exhibit a procedure more intellectual than technically formal; and if at times the English lawyer in the House of Lords is unable to appreciate a result to which the peculiar channel of his legal inquiries do not lead, the presumed error of the Scotch judge ought to be attributed rather to a disconformity with the requisites of a judicature different from the Scottish, and it may be better, than to a want of anxiety in the application of his learning, or unfaithfulness in the judicial administration of his own jurisprudence. Let any of our readers visit the courts of the two countries, and he will be struck with the distinctive characteristics to which we refer. In the English court he will hear a skilful dissection of a statute, with a ready citation of cases and precedents; or, it may be, a motion on some point of procedure, supported by a well arranged statement, in which some nice question of pleading will be clearly and logically put to the judges. But in the Scottish forum he will find more deliberation and purpose, and possibly he will discover his mind to be interested there by a purer form of argument. But while he will recognize in the argument of the Scottish advocate more of the spirit and principle of the jurist, than in the terse reasoning of the English barrister, he will miss the exactness, the precision, and the strict forensic method of the latter. This cannot but be ascribed to the different systems of pleading under which the English and Scottish lawyers are respectively educated. Pleading is the discipline by which the training of the professional mind, and so the professional character, is governed; and according as that pleading is true and accurate will be the success of the practitioners' labours, and the certainty and justice of the law, which it is the office of pleading practically to develope. When we consider what a fine system of jurisprudence the Scotch is, we must desire to see it aided by a sound, a strict, a philologically precise style of formal allegation, a form of averment that would exclude all popular and general idioms, rejecting all periphrasis, and enforcing, by stringent rule, that plain unambiguous and direct statement by which law most effectively announces itself. It should, however, be kept in view that in Scotland jurisdiction is not divided into law and equity, and that therefore the practice of the law there is not capable of such distinctive conciseness as our common law. In England

the tendency of late reforms in the law has, however, rather been to bring the two jurisdictions nearer each other. These reforms may, for the most part, be referred to *equitable considerations*, and there is much in the spirit of our legal practice to encourage this legislation. Jurisdiction divided into that in equity and in law has not been, nay, cannot be, carried out with exclusive strictness. The English common law jurisdiction, including trial by jury, is not a pure one, in some respects it is anomalous. The pleadings are strictly of a law character, and as they mark out undeviatingly the field of inquiry, they countervail the equitable leaning of the common law. But the trial itself is an equitable proceeding. The jury are so many judges in equity; the speeches of counsel before them are simply appeals to that equity; and the verdict is their equitable finding, a striking of the averages, a balancing of the case with their reason and sense of justice, to which it is felt to be impolitic and unwise to oppose limits of legal art. The province of juries is now a large one; they do not decide mere isolated matters of fact, but they are held to be cognizant of the law, and try and determine important rights. There has been many a just verdict against previously decided law. Yet it is by such means that our common law grows, by such means that inflexible law merges in equity. Still to this jurisprudence the general plan of our law pleading may be preserved, although it may be futile to apply to it all the conceits of bygone times.

But Scotch pleadings are not moulded conformably with this plan: they are not drawn according to the *issuable design* by which our English common law pleading is distinguished. They do not necessarily and intrinsically tender issue, which we think they ought in form to do. They are not, however, made *at large* in the loose sense, as Mr. Stephen seems to imagine, but after a form which is intended to have the effect of bringing out everything of importance to be known before coming to trial, which is had upon an issue extracted from the pleadings. Thus the inconvenience of any defect in design, if not compensated for, is at least greatly obviated, by the comprehensive and circumstantial manner in which the facts of a case are set out in a Scotch record. A brief sketch of Scotch pleading, as it is, will here not be uninteresting to our readers, and will enable them better to understand our views on the general subject. A judicial record in Scotland is framed under the regulations of the statute 6 Geo. IV. c. 120, called the Judicature Act. It begins with a *summons*, a pleading analogous to the English declaration, and drawn in the syllogistic form, or, to speak more correctly, its logical structure is the enthymeme; for, like most

other legal instruments, its major premiss is suppressed.¹ It differs from the other pleadings in not being signed, or in general prepared, by counsel, but passes under her majesty's signet, and in its formal terms proceeds in the sovereign's name. But if not actually drawn, it is usually revised by counsel, a precaution which Lord Chief Commissioner Adam was of opinion should in all cases be taken; and certainly, when we reflect how important it is that actions should be well laid at the commencement, the expediency, we would say the necessity, of having recourse to the best legal advice in the preparation of the opening pleading, seems apparent. The summons sets forth the demand, the right or the wrong founded on, finishing with appropriate conclusions in law; and, according to the authoritative and learned testimony of Chief Commissioner Adam, himself an English lawyer of great experience and for many years the presiding judge in the Jury Court in Scotland, "is systematic in point of form, and if drawn with care and skill (if it were more technical in expression) there cannot be a more correct and better pleading."² This summons is met by *defences*, which contain the defendant's (or defender's, as the Scottish nomenclature has it,) ground of opposition in fact, with legal reasons assigned after a set form. The defences may either deny the facts alleged in the summons, with, if necessary, a plea *inter alia* on the relevancy; or they may admit the facts founded on, and plead new or collateral matter in defence, that is, as we would say, confess and avoid. This pleading must contain all pleas, dilatory and peremptory; for in Scotland pleadings in fact and law are combined, although the fact and the law are arranged after a distinct order. The dilatory pleas are first taken, and if these are disallowed judgment is given to plead over on the merits. The defences are not formally *replied to*, a proceeding rendered unnecessary by the other pleadings not being essentially issuable in their structure.

The defences and every subsequent pleading are drawn and signed by counsel. In Scotland there is no distinct body of *pleaders*, as with us,—the duty of "making up the record" devolving on the junior counsel.³ If the summons and defences are deemed sufficient to plead the subject of the suit, an issue, if it be an issue in fact, is adjusted before the proper officer, or "issue

¹ The only pleading of which the writer of this article is aware as prepared after the plan of a pure syllogism is the Scotch criminal indictment. That instrument declares on the face of it the major proposition, or general ground in law on which the criminal charge is laid. It is the *ex officio* information of the Lord Advocate as public prosecutor.

² Adam on Jury Trial in Scotland, p. 15.

³ We believe a rule of the same kind prevails at the Irish bar.

clerk," as he is called, the record is "closed," and the trial takes place at the first sittings or on circuit, unless cause be shown for deferring it. But if it be thought expedient to have a fuller record (and this is the general case) an order or rule of court is taken for a *condescendence* and *answers*. These are separate pleadings, the *condescendence* being the plaintiff's (Scotticè pursuer's) paper, and the *answers* the defendant's; and by them respectively all the facts of the case are averred and answered in an articulate manner. They are pleadings of pure averment, without argumentative matter or matter of evidence. The *condescendence* and *answers* are exchanged and "revised" by the respective pleaders, and thus amplified the whole is submitted to the issue clerk, who (under review of the court on cause shown) settles the issue or issues which are to try the action. This completes the record. The counsel and agents on both sides attend the issue clerk at the framing of the issue, which is usually the general issue, prefaced with an admission or admissions; but if suitable to the action a special or specific issue or issues on particular points of the case may be taken. It may be gathered from what we have said, that the meaning given in Scotland to the term general issue is different from that which is understood by it in England. With us the general issue is a plea pleaded by the defendant by way of traverse to the whole declaration, whereas in Scotland it is just what its name imports, a substantive issue or proposition on the whole case, and expressed in general terms. Mr. Macfarlane, of the Scotch bar, in his excellent treatise on issues in jury causes, says, "The distinguishing and peculiar feature of the principle now observed in the adjustment of issues is, that while the real and leading point on which the litigation turns is fairly brought out and indicated, this is done in as general and comprehensive a manner as possible." But although the issue be thus general in its form, parties cannot by evidence travel out of the record, of which the general issue is the embodiment, and with reference to which it must be read. There is another issue peculiar to the Scottish system, called a *counter issue*. Where the defences admit, colourably or expressly, the plaintiff's facts and their relevancy, and plead new matter, the defendant usually takes a counter issue, that is, an issue concentrating in its terms the new matter pleaded by way of avoidance. The pleas proper to this form of issue are pleas in justification and excuse, and pleas in discharge; and generally the principles which regulate the use of the counter issue are the same as those on which our doctrine of confession and avoidance is founded. An issue in law, corresponding in sub-

¹ Macfarlane on Issues in Jury Causes, part i. p. 8.

stance to the English general demurrer, may be brought out in a preliminary defence in the shape of a question of relevancy ; or as resulting from admitted or proved facts ; or as arising out of a special verdict, or reserved question of law. There is, however, this difference between the Scotch issue in law arising on a point of relevancy and our general demurrer, that if the judgment be for the plaintiff, that is, if the demurrer, so to speak, is disallowed, the defendant may then plead over, and in his defence always does, to the fact ; for the legal objection in Scotland does not hold the party pleading it as admitting absolutely the fact or facts on which it is raised. Our doctrine on this head is not understood by our northern friends, and indeed it is difficult to defend it, except on the ground of convenient dispatch for the court. In any other view the rule is at least of doubtful propriety. Here the rule of English pleading as to the singleness of the issue (to which we shall presently more particularly refer) operates unjustly. In such a case, *costs*, irrespective of the ultimate decision of the suit, would be the only advantage we would give a plaintiff. But in comparing our system with the Scotch in this respect, it should be kept in view that a general demurrer to the declaration is a plea on the merits, and not a dilatory plea ; if it were we would, in accordance with our principles, plead over. The Scotch plea on the relevancy, again, while it is substantially a plea on the merits, is preliminary, and in form of a dilatory quality, but in meaning and intention it corresponds exactly to our general demurrer ; it goes to the legal essence of the case, for it is an objection to the sufficiency in substance of the plaintiff's demand. Sometimes the question of relevancy is reserved till the pleadings are closed, a proceeding somewhat analogous in principle, with reference to the plea maintained, to our rule of *aider by verdict*, or the parties consent to take judgment on the record as adjusted, when they are heard on the whole cause.

From this short description the difference in form and effect between English and Scotch judicial allegation may be seen. That difference resides in the design of the manner of statement and in the mode of deriving the issue. The Scotch issue, if it be an issue in fact, is extracted from the pleadings ; if one in law, it is not in the same way literally extracted from the pleadings, but is held to be sufficiently presented by their terms. But in neither case is the issue, as with us, necessarily and intrinsically tendered by the pleadings. We must say we prefer our mode of joining issue in point of form. It may, however, be a question whether it be substantially a better one than the Scotch. It is to be observed, that the *matter* which, according

to the intrinsic working of the pleadings, is "thrown off," is so *by anticipation*; whereas according to the Scotch plan the issue is extracted from the pleadings under the full advice and instruction of all the averments. By this proceeding it may be argued that a better, that is, a more surely complete, issue is likely to be obtained; but we conceive that the preponderance of judicial considerations is in favour of the English form. Sir Matthew Hale quaintly says, that "a thing should be so pleaded that it may be tried," a remark which, so far as pleadings themselves are concerned, can be most truly applied to our own. It certainly is in the issue, evolved by the intrinsic operation of the pleadings themselves, that the merit of English pleading is allowed to consist. English writers on the subject (and here we may remark that almost all the works on pleading are good, because the science is so peculiar and recondite, that in order to being understood at all, the language employed in describing it must be very clear and precise,) have stated, as a general reason for the adoption of the English plan, that the end which special pleading proposes to itself is to evolve or eliminate the real matter in controversy in a simple form, without the qualification of circumstance or embarrassment from collateral topics. "When compared with other styles of proceeding," says Mr. Serjeant Stephen in his admirable treatise on Pleading, "it has been shown to possess this characteristic peculiarity, that it *produces an issue*." We would add to this definition and say, that the general characteristic of the whole design of the English system is so to shape the pleadings, that on one side they intrinsically tender, and on the other intrinsically accept, issue simply, or several resulting issues, which by the very act of, the manner of, and the generic peculiarity of the pleading, is or are mutually and necessarily referred by the litigants for decision to the court or to the jury, as the case may be.

If the issue or issues so produced be duly given effect to, we apprehend the intention of the system to be satisfied. But that intention is further narrowed, and a particular quality in the mode of applying the design of the pleading has by inveterate habit been made, or held to be, part of the system itself. The rules which regulate the practice of our common law courts peremptorily require the issue to be not only *certain* and *material*, but *SINGLE*. By this is meant the limitation of the issue to only one plea in law, although there might be several. We can appreciate the practical convenience of such a result, and, wherever fact and law admitted of it, we would have the issue single. But a critical analysis will enable us to see that the enforcement of the rule of singleness, in every case, is at vari-

ance with a system of true allegation and sound juridical judgment. We do not however perceive that either the rule, or the explanation offered for it, is necessary, in order adequately to sustain the acknowledged design of English pleading. "A record," according to Lord Coke, "imports such an uncontrollable credit and verity as to admit of no averment, plea, or proof to the contrary;" yet in many instances this requisite of singleness must be inconsistent with the truth of the case, and it surely is neither a compliment to the learning of the judge, nor a tribute to the intelligence of the jury, to say that an unqualified simplicity and unity in element, which would divest the issue of all but one legal consideration, where there were many, is necessary to their understanding of the question submitted to them. Here the Scotch method of pleading, although in other respects less scientific, is preferable. That system is alone concerned for the complete specification of all the facts on which the parties profess to rely, the immediate object being a perfect disclosure, with all the materials for an issue on which a suitable trial may be had. Pleading should do something more than merely delineate the external form and quality of a legal statement: it should provide for that statement being sufficiently full and comprehensive, so as reasonably to secure against surprise by the addition of every relevant detail, not of itself purely matter of evidence, which may assist the final and conclusive determination of the cause. Once in a court of law, a party should not on the same set of facts be obliged to place himself at the bar of a court of equity, but, as was represented to the last law commission by Lords Abinger and Denman, the forms of the common law court should be sufficient for all purposes. It is, however, frequently found to be otherwise by the jaded and fatigued suitor, whose case, if he abides by the resources of the one court, is literally winnowed of its real merits by the effect of this required singleness. If this singleness could be effected in truth, if it could be arrived at by the NECESSARY, FULL, and FREE working of the pleadings themselves, and these pleadings of a strength and power which would embrace every ground and principle of law pertinent to the facts, no objection could be advanced. We have, however, only to point to two leading rules of English pleading, under the head of *DUPPLICITY*, to show the injustice of the artifice resorted to. The first of these rules is, that one *cannot plead and demur to the same matter*. If he pleads to the fact, he is thereby compelled to waive all objection in view of law; and so as to the effect of a general demurrer, if he demurs on legal ground, he, as the necessary consequence, is considered to

admit the fact as alleged by his opponent; because if it were not so, there would be two issues in relation to the same subject of suit, one an issue in law, and the other an issue in fact; this would be *double* pleading, and the issue would not be single. We have great difficulty in appreciating this artistic refinement. The idea of holding, say, a defendant, where the decision is against his demurrer, so absolutely confessed to the fact as that the plaintiff is entitled to judgment to recover, is somewhat startling. The facts founded on may be untrue, and the defendant may know them to be so, and be able to disprove them, and yet at the same time he may conceive that all that is set out in the declaration is insufficient in law to instruct the plaintiff's claim, which accordingly he puts to the test of a demurrer; but why, when the plaintiff has merely stood such test, the defendant should be considered in the same position in relation to the facts as he would have been if these had been established by evidence, we cannot clearly understand. But the other rule to which we now refer, and which relates exclusively to the form of the issue in fact, does the greatest violence to principle, on account of this fanciful notion. We allude to the form of the *replication*, (the subject of condemnatory remark by Mr. Phillimore and others,) which shows that it is by *forced* means—by a rule which, as regards the merits of the case, is *extrinsic*—that the issue is made single. A defendant may plead several pleas, but a plaintiff can make but one single reply to each. He cannot reply all his replies, however consistent they may be. He is not allowed his full and free answer; he must elect the matter of his replication from the several grounds he may have in law, else (not that the right would not be properly pleaded, but) the issue would not be single! This is surely unjust, an uncalled for sacrifice to convenience in form. It is clearly, we apprehend, insufficient pleading. There may be two or more good replies, each sufficient, in legal contemplation, to decide the action, yet they may not be inconsistent or in the least repugnant; and it is hard to require that evidence on the one, it may be a failure in evidence, should exclude a hearing on the other. We say a possible failure in evidence, because it might so happen that the matter of replication fixed on could not, owing to some unforeseen accident, be established at the trial. But although the plaintiff might have another good reply in law, he is forced to peril his case on the replication he has made, and thus (adopting Mr. Stephen's reasoning with respect to the allowance of several pleas under the statute of Anne), by a mistake in the selected reply, the restriction occasions the loss of the cause, contrary to the real merits. Justice and legal

principle allow a full and free reply to all the defendant has alleged, but *the rules of English pleading are stricter and severer than the law itself*, and the plaintiff is obliged to make, not a certain and perfect, but a *chance reply*. The narrow technicality of the pleading may defeat the legal right. It is extraordinary that the New Rules did not correct this great and admitted evil,—it is an admitted evil. Mr. Stephen allows it to be an anomaly, and justifies it on no ground except its practical utility; it is mechanically useful and convenient. The form of the replication was noticed, and publicly complained of, before the New Rules were promulgated. Lord (then Mr.) Brougham, in moving for the Law Commission in 1828, remarked upon it and other abuses in pleading with great force. “There is another inconsistency,” said Mr. Brougham, “in our system of pleading, which I cannot allow to pass without notice. A defendant may plead, but a plaintiff cannot reply many matters,” and he gave an instance in *indebitatus assumpsit*. *Pleadings must be true*, but the replication is not a true, because it is not a full, fair, and candid pleading. Can it then be said that our pleadings, if left to themselves, if allowed to act freely, do of their own intrinsic operation produce a *single* issue, a single and certainly sufficient issue? It cannot. The issue, as now produced, *does not exhaust the pleadings*, and its “convenient” form is obtained at the expense of justice. Mr. Stephen is of opinion, and we apprehend correctly, that this peculiarity as to the issue took its rise in the ancient practice of *oral* pleading, but it is evident he feels it cannot be referred to any sound principle. He says, “while several issues, therefore, must of necessity be allowed in respect of *several subjects of suit*, the allowance of more than one issue in respect of *each subject of suit* (or of one subject of suit of course) is in some degree a question of expediency.” And again, “But whatever the reason, it is clear that in point of fact this principle was very early recognized in pleading, and that the issue was required not only to be *material* but *single*.” There may, under the Statute of Anne, be several issues in respect of a single claim, and so far the law has been improved; but still the issue must be single, and in order to its being so, the plaintiff is prevented from having as many replies *in foro* as are within the legal principles applicable to the nature of the case. Under the existing form, therefore, the record is imperfectly framed; it may indeed be essentially untrue; it may have excluded from it relevant, pleadable and issuable matter, going directly to the justice of the case, and the issue joined may not thus be the real, entire and perfect result of the pleadings. If

¹ *Mirror of Parliament*, vol. i. p. 86.

the pleaders of Scotland, or of other countries, see anything in our system which might be advantageously introduced into theirs, let them not begin with this figment of the singleness of the issue. Their own existing practice, which concentrates in the settled issue all the law of the case, is a more enlightened course of proceeding.

If the rules against duplicity were reconsidered, they would perhaps be wholly abandoned. They do not profess to proceed from any fundamental principle of law, but were contrived solely for a supposed convenience in practice, to effect a forced singleness on the issue, on the impolicy and injustice of which we have remarked. These rules are now of partial application, which we think wrong. We do not understand why a particular principle of constructive allegation should not apply to one pleading as well as to another. The principle has been conceded in the case of the defendant's plea, for reasons of justice,—reasons which, without regard to convenience or utility, ought to govern the structure of the whole record. All forms of pleading should exhaust the jurisprudence they are designed to administer. A pleading may be "double," but it may be rightly so, and a litigant ought not to be blamed, much less put out of court, because he avails himself of all the powers the law, by its received principle, gives him,—because he would make the law's advised and undoubted theory a juridical reality.

But it may be asked, if you relax the rules of duplicity, where would the pleadings end? If the plaintiff may reply all his replies, the same latitude must be allowed in the subsequent pleadings, and the effect would be not only the production of several issues on the same plea, but encouragement would be held out to tedious and involved allegation. We would answer, that jurisprudence is now so far advanced, and legal principle so clearly ascertained, that few, if any, cases could arise, which would not under an issuable form of averment, assisted by duly prescribed forensic language, speedily resolve into its proper conclusion; that tedium and complexity could easily be prevented by well considered regulations; and that the production of several issues on the same plea is not essentially an evil in pleading, but a mode of result which the very simple expedient of joining them all in one distinct and substantive question to the jury, would make conducive to the ends of a comprehensive justice. The case ought to have its own *EVENT*, as Lord Stair, in his *Institutes of the Scotch Law*, quaintly but forcibly calls it; we ought not to give the event to the case, or, by artificial rule, curtail it of its due dimensions in law. The analogy afforded by a Scotch case, that of the Earl of Fife and Earl of

Fife's trustees,¹ serves to illustrate the principle here contended for. That was a case relating to the execution of certain deeds, as to which generally the statutory regulations of the Scotch law are very careful and always strictly enforced. The deeds were granted by the deceased Lord Fife, who was said to be blind, and in such circumstances the law superadds some anxious provisions, so as to make sure of the instruments being the intelligent and deliberate acts and deeds of the party. The succeeding Earl of Fife brought an "action of reduction," in which it was averred that the legal solemnities proper to the execution of the deeds had not been attended to, and that therefore they ought to be reduced and set aside. The Scotch Courts, in order to ascertain the truth of the facts pleaded, directed certain specific issues on the different grounds on which the action was laid. Of these there were no less than seven. They were not all absolutely necessary for the decision of the action—one or more of them might have been sufficient to do that, but according to the comprehensive rules of Scotch pleading they were all the proper results of the facts set out. They were such as these: whether the earl was blind? whether his subscription had been duly adhibited or acknowledged in the presence of the instrumentary witnesses? whether the deeds were read over, and there were no means of the earl knowing what their contents were immediately before signing? and so on, till all the points in the cause were brought out by specific questions. But the House of Lords, in subsequently reviewing the case, allowed a new trial, and directed that the issue for trying the validity of the deeds should be this, "whether the deeds were not, or either of them was not, the deeds or deed of the Earl of Fife," an issue which admitted of all the evidence the other seven issues required. There was no counter issue. The speech of Lord Eldon, in moving the judgment of the House, was most luminous, and has ever since regulated the practice in the Scotch courts. The principle is, that although an issue may be sufficient, in legal contemplation, and with reference to the unopposed effect of a particular rule of law, to decide the case, such issue may not embrace *all* the fact and law, may not exhaust the merits, and so may fail in determining the right as between the parties. There may, and frequently are, cases where special issues on specific points can be advantageously taken; but, for the trial, it must always be desirable to have, if possible, *one* issue, or if the suit divides itself into heads or distinct rights, several issues of substance, which is or are to decide the cause; and not only so, but which will enable

¹ Murray's Reports, vol. i. p. 90; and Shaw's Appeal Cases, vol. i. p. 498.

the jury by their verdict to *declare* the cause to be decided. When special issues or points in the cause are put to the jury, the verdict merely answers the issues without reference to the judgment of the jury on the demand or right which is the subject of the action. The finding of a jury on any number of points, unless put in terms which imply a cognizance of the merits, and so a final judgment on the matter of the cause, does not, by force of the intrinsic power and quality of the verdict, decide, because it does not *bear* to decide, the right and justice of the case. We take it to be consonant to the true theory of jury trial, as a general rule, that *the verdict should, on its face, show a judgment on the evidence and whole cause*, and that it is not enough for a jury to say we find certain pleas made good, without at the same time showing *for whom*, or for whose interest, for the vindication of whose right, they give their verdict, under the issue on which the cause is made to depend. And it is this characteristic requisite of a proper verdict that shows the necessity for a full and comprehensive system of pleading. Such a verdict on an incomplete record, or a record that, by an inflexible application of the rules respecting duplicity, was hampered in its pleas, would clearly work substantial injustice. But as the verdict in question is the just and true one, it follows that the averments and pleas in the record should be correspondingly ample and relevant. The law, in all respects, should be entirely satisfied. Now according to the principle recognised by Lord Eldon in the *Fife* case there might, in most suits, be settled an issue sufficiently specific as regards their merits and grounds, all of which it might include, but general in form, and which, with due precautions as to the affirmative or negative of the case, would answer every necessary purpose. The plaintiff would thus be enabled to reply all his replies; everything would be sent to trial; and although the jury might by such a course have a larger field of inquiry, they would be better instructed for a right deliverance in the cause. This form would be a true and perfect issue, and might either be agreed to by the pleaders on both sides, or settled for them. No retrospective examination of the pleadings, as in Scotland (of which proceeding Mr. Stephen seems to be afraid) would be necessary, but the record would stand with its several resulting issues or points, and all that would be required in settling the issue on which the trial was to take place would be to embody all the points into one general question, which would be taken as the issue in the cause. And not in the hitherto received and technical, but in the best sense of the term, would this one comprehensive issue be a *single* issue, for as regards the defendant it would raise but one question, that of his legal liability;

and to meet our other juridical desiderata it would be the result of the "intrinsic operation" of the pleadings—their legitimate, necessary, and certain development.

But where the duplicity amounts to inconsistency, in other words, where there is *repugnancy*, the pleading is on obvious principle utterly bad,—a demurrer to it goes to the honesty and true purpose of the party offering the plea, and ought at once to be allowed. The rules against repugnancy, both as respects form and substance, cannot we think be applied with too great rigour.

Not remotely connected with the subject of repugnancy is the doctrine relating to a *negative pregnant*, which appears to have excited Mr. Phillimore's especial indignation. The case, however, to which he refers, does not show any particular objection to the rule itself, but rather points out an awkwardness arising from the time and mode of pleading it. Certainly no material traverse should be pregnant with an admission, or have any insensible quality pertaining to it. There is really here no grievance. Matter of fact, if pleadable at all, should be unequivocally set out, so as to leave no doubt of its plain effect in law; and the utmost perfection and precision in language, the purest style of allegation, should be brought to the aid of all judicial proceedings. These and other rules of English pleading, by which a pure and conclusive character may be given to the language of averment, commend themselves by their logical excellence.

We would now, in concluding our remarks on the general design, respectively, of English and Scotch pleading, notice a quality pertaining to our system which exhibits an obliquity, so to speak, in its actual structure, and as to which it has been considered to contrast unfavourably with the Scotch forms. We allude to the exceptionable feature of our law records not affording a proper disclosure of the case to be made, by which the subsequent contention ought in fairness to be guided, and to which all matters of law and evidence may advisedly be referred. Something beyond the record is consequently required, e. g. a bill of particulars, to make up the defects of the pleading and render the record intelligible. A better and juster system in this respect obtains in Scotland. The condescence and answers are pleadings so drawn as completely and fully to disclose the case of both litigants, so that their form affords every reasonable security against surprise. On this subject the Lord Chief Commissioner Adam observes,

"Pleading by condescence and answers was a course anciently adopted in the Court of Session in Scotland when trial by jury in civil causes formed no part of the judicial system of that country. This course of proceeding now affords the most perfect security against

surprise in the trial of issues. The mischief of surprise at *Nisi Prius* has been so severely felt in England that it has been a principal cause of the introduction of the New Rules, as they are termed, into the special pleading of that country.”¹

No facts can be proved or in any way founded on at the trial which are not in the record. If new relevant and material facts subsequently arise they must, as matter for pleading to, be pleaded as *res noviter veniens ad notitiam*, and then they ground a motion for a new trial. Thus, every thing must be pleaded, and no use can be made of omitted matter. The excellence of this rule of Scotch pleading was acknowledged by the House of Lords, a few years ago, in giving judgment in a Scotch appeal, where the point arose on a bill of exceptions which had been taken to the charge of the judge, the present Lord Justice Clerk of Scotland, in a case relating to the infringement of a patent. The case was that of the Househill Coal and Iron Company v. Neilson and others,² and the point in question arose in this way:—After the issues were adjusted, but before the record was closed, the appellants gave the respondents notice of certain objections on which they intended to rely at the trial. The notice was made under a certain statute; but the Lord Justice Clerk ruled that the statute did not apply to Scotland, and that the matter of these objections could not be so supplied, and the Court of Session subsequently disallowed the bill of exceptions, remarking at the same time on the difference of pleading in England and Scotland. On appeal the House of Lords unanimously held that such ruling was correct, Lord Campbell thus expressing himself,

“It seems to me, that that section of the recent Act of Parliament about giving notice does not apply to proceedings in Scotland, * * * the language employed shows that it was not so intended; and there was this plain reason for abstaining from carrying into Scotland that provision, namely, that the law of Scotland required no such amendment, because by the very salutary practice prevailing in that country there is no danger of surprise, the condescendence and the statement on the record being to be looked at as confining the general issue, that might be granted to try the merits of the questions. I am therefore clearly of opinion, that where an issue of this sort, which in the north is called a general issue, is granted, the learned judge at the trial is fully justified in looking, and ought to look, at the record, and to confine both parties to the facts and circumstances that are therein alleged. Looking at the record in this case, it seems to me

¹ It is understood that the late Sir William Follett approved of pleading by condescendence and answers, and that as a method of averment the form of these papers was, in his opinion, peculiarly suited to the spirit of the Scotch law.

² 9 Clark & Finnelly, 788.

that it excludes evidence of the trial which is supposed to have taken place at —, and that the defenders were not justified in entering into evidence of such trials at any of the places which are not specified in the record. * * * I should have been most sorry indeed to have at all prejudiced the salutary practice which prevails in Scotland upon this subject, and I wish that in England similar rules prevailed. According to the ancient practice of pleading in England there was notice given, because in a writ of right the demandant stated specifically the title that he made, but in an ejectment nobody can tell what case is to be made on the part of the lessor of the plaintiff; and I can say, from my own experience, that I have repeatedly gone into court, being counsel for the defendant, where an action was brought to recover a large estate, not only ignorant of the particular facts that were to be given in evidence, but not knowing what title was to be made; whether the lessor of the plaintiff claimed as heir at law or under a deed; whether he impeached the title of the purchaser in himself, or whether it was a question of parcel or no parcel. That certainly leads frequently to surprise in England, and renders it necessary, on the ground of surprise, that a new trial should be granted. A much more salutary system prevails in Scotland, which I know this House most highly approves of, and will most carefully guard."

Besides the peculiarity of its formal design, there are two particulars by which English pleading is distinguished from Scotch; these are, first, *the prescribed technical style* which the English pleader *must* on all occasions adopt, without regard to the suitableness of any other form of language; and, secondly, the use we make of *fiction*.

We have already remarked on and objected to the excessive technicality of our English forms; but we would not allow a large discretion to the pleader in the manner of his allegation. We think our brethren in Scotland err in permitting perfect freedom of expression in the structure of their records, for, with the exception of a few words of style in the summons, it is so with them. The Acts of Sederunt, we have said, contain very admirable rules for the preparation of pleadings, so far as external form and order are concerned, but they do not enjoin any particular phraseology of style by which the law may be impartially declared upon at the bar. The consequence is the want, in most cases, of a due precision and a *bias* in the averments. Styles of pleading might not be so conveniently employed in cases where equitable views were mixed up with the strict rules of law, and which had to be argued and decided upon the adjusted record alone; but, in cases intended for trial by jury, we cannot help thinking that forms of style, not corrupted like our English forms with an antiquated and unintelligible fiction, but adapted to a simple and brief statement of all the details of the case, would be found to afford great facilities

in setting out the facts in the pleadings and in the preparation of the issue, which, indeed, or the matter for it, they might be made intrinsically to tender. The purpose of the pleading is to inform the court and the jury of the matter in controversy, and, in order to perspicuity and conclusiveness in argument as well as to distinctness in evidence, and thus to a certain and true decision, the allegations on either side should be made with as little bias as possible, and the absence of this bias will be best secured by a technical style,—a style that would exclude all fictitious peculiarities, setting forth and pleading in true technical terms, derived from the law, all relevant grounds of action and defence. But a perfect method of technical averment, and a style so complex and artificial as not to carry any direct meaning, that is not obvious in its intent, that would obscure the facts and subvert the true juridical explication of the law, are surely not correlative requisites in pleading. The one does not lead us to desire the other: they are even opposed. Nay, technicality, when carried so far as it is in our existing common law system, must, instead of sustaining right and protecting truth, cause the worst of all confusion, the confusion of form, a fatiguing prolixity without the relief of that just demonstration and sequence in result by which our courts ought to be directed. Our records are now trammelled with much useless style, working out, indeed, in the only way they can and according to views that incorrectly imagine it a necessity, a single issue, but throwing no sufficient light on the real and circumstantial state of the case. The effect of the whole is to conceal, and not to show, the matter of right to be tried. In illustration of this we would here quote a case cited by Lord Brougham in the celebrated speech to which we have already alluded. It shows that the extreme technicality of English pleading may sometimes obstruct its design, and that in the most material part, the issue:

“A gentleman of the name of Robinson in Yorkshire,” said Mr. Brougham, “I trust that he was no relation to the illustrious nobleman who lately filled so distinguished a situation in his Majesty’s councils, was minded to try the resources of the law in an action of trespass against some poor men who lived near him in Yorkshire. In the course of it reference was made to the Master to report by whose fault the pleadings in the action had extended to a most enormous and unprecedented length. The Master reported that in the declaration there were five counts; that twenty-seven several pleas of justification were pleaded by the defendants, which, with replications, traverses, novel assignments, and other engines of pleading, amounted at length to a paper book of near 2000 sheets.

He was of opinion that the fault lay principally in the intricacy and length of the declaration, the action being only brought to try whether the freeholders and copyholders of the manor of Ellerton in Yorkshire (whereof Mr. Luke Robinson was lord) were entitled to common in a ground called the enclosure. He likewise reported that the declaration was so catching by running changes upon the several defendants and the several names of the disputed ground, *that it was necessary for the defendants to guard every loop-hole*, which made the pleas so various and so long—especially as Mr. Robinson had declared that he had drawn the declaration in this manner *on purpose to catch the defendants*, and that he would scourge them with a rod of iron. The court was very indignant at this abuse of the technicalities of the law, and Mr. Justice Blackstone said that Mr. Robinson appeared *in propria persona* to show cause against this report, no other counsel caring to be employed for him. He insisted that the question was to him an important question of right—that he was justified in doing what he had done, and that the whole declaration was necessary. The court was strongly inclined to fix some heavy censure upon him, but desired that previously the question of right might be tried. *It likewise ordered Mr. Serjeant Hewitt on the part of Mr. Robinson, and Mr. Winn on the part of the defendants, to settle an issue for that purpose; and these gentlemen settled such issue in a quarter of a hour, and in the small space of a quarter of a sheet of paper.* Talk of scourging men (the noble and learned lord proceeds) with a rod of iron! Why should he do so? The lash of parchment which is applied to all suitors in our courts of law, that flapper which keeps them awake by the sufferings it inflicts, that excellent and parental corrector of human errors, *those engines of pleading which, when they pretend to enlighten, seem only to keep the court and the suitors in the dark*,—that lash of parchment, I repeat, which like a goad drives men from one stage of misery to another, till it makes them plunge into complete and irretrievable ruin,—that lash of parchment was far more safe as well as effective, and a far more fatal and deadly scourge than any rod of iron which this wealthy oppressor could have employed to gratify his vengeance.”¹

Such cases, it is to be hoped, have not been of frequent occurrence. But the English common law record, even in its best case, is not a direct dealing of law with fact. It does not tell its own story, but is discovered by an extrinsic interpretation. From this, however, we must not argue against all technicality: its abuse is one thing, its disuse another. An obviously intelligible construction and technicality are not only not necessarily or essentially incompatible, but the latter may be made, in judicial proceedings, to advance the cause of justice by a true application of law, and the dignity of jurisprudence would seem to require that its utterance should not be left to popular or conventional idiom. Yet there are those who contend for entire

¹ Mirror of Parliament, ut supra, p. 88.

freedom in the phraseology of pleading, deeming the bare state of the case its best form. Many plausible reasons might be assigned for this opinion. The very narrowing and confining the unlooked for, uncontrived, and unanticipated circumstances of a case within the limits of a pre-arranged and exact technicality, so peculiar as to have its own independent law and reading, must, it has been said, be more or less injurious. This may be too much the character and tendency of our English pleading. But, respecting it, we may observe that its forms cannot be said to have come to us directly for the mere purposes of pleading. They were intended not only to plead the right or thing which would be the subject of suit, but at the same time to found a proper jurisdiction which would keep the case within the defined limits of the respective courts of law. The peculiar technicality of our existing forms is thus, to some extent, accounted for. But another reason for it is suggested by a circumstance which we cannot better state than by quoting a passage in the Appendix to Mr. Stephen's work to which we have so often referred :—

“It is clear,” he writes, “that the pleading (i. e. the *oral* pleading) was in French, if not from the Conquest, at latest from the time of John and Edward I., and so remained till by stat. 36 Edw. 3, st. 1, c. 15, it was enacted that thenceforth the pleading should be no longer in French, but in English, and should continue to be enrolled or recorded in Latin. Afterwards, on the introduction of paper pleadings, they followed in the language, as well as in other respects the style, of the record, and were, therefore, drawn up in Latin. This continued to be the practice till a period so late as 4 Geo. 2, c. 26, when it was provided that both the pleadings and the record should thenceforth be framed in English, and it is in this language that they have ever since been drawn; *the ancient terms of art and forms of expression which had been so long known exclusively in a French and Latin dress being now literally translated into English, but with that exception remaining undisturbed.*”¹

It would thus appear that, even to the extent to which they go, our pleadings do not set forth the matter of the cause so fully and plainly as the more copious significance and etymology of our language would require. They are not only a *translation*, but a translation of *ancient terms of art and form*, a circumstance that might afford important views in interpreting a very technical record which was doubtful in its meaning. The

¹ In the argument on the writ of error in the late Irish state trial it was objected by the counsel for Mr. O'Connell and the other plaintiffs in error, that the word *demonstration* which occurred in one of the counts of the indictment was bad pleading, that it was a *French word* and not a proper *vocabulum artis*. This is surely precision sublimed into inanity. The indictment was drawn by a gentleman who is considered the ablest pleader at the Irish Bar.

length to which technicality is carried in our English system of pleading is thus explained, but it is not the less to be regretted. We advocate, however, a certain measure of technical form, a technicality that would allow the utmost freedom in the *matter* of the pleading, but that would at the same time obviate the influence of bias in its *manner*; that would ensure its relevancy and certainly develop all its issuable properties.

The Scottish courts do not recognize any fictions analogous to those which we have admitted into our practice of the law. There are a few peculiarities in their general forms which may be called fictions, but they do not interfere with the plain and intelligible expressions in which their pleadings are conceived. We are of opinion that all fictions, as legal expedients, are more or less bad. Such violent fictions as those which regulate the procedure in cases of ejectment in England appear to us to be utterly unjustifiable. They may be explained, but they cannot be defended. Will it be said that the principles of English law are so unworkable, that, in order to the legal vindication of property in land, it is necessary to resort to machinery which has to be maintained by such ludicrous and insensate fiction? and that that can be done in a false character which cannot be effected in a true one? No wonder we find Lord Campbell adducing his bar reminiscences and complaining of the paradoxical proceeding. Really the absurdities gravely introduced into this form of action would almost suggest the thought that its inventors felt the law of England was not learned or difficult enough, and that with the view of making it a more incomprehensible study, it was necessary to invest it with a mysterious erudition which would make English jurisprudence a more terrible thing to look at than it is in its own nature. On this subject, and the fictions in pleading generally, we would refer our readers to "Extracts from a Lecture delivered by Martiford Longfield, Esq., LL.D., in the Dublin Law Institute, May, 1842," published in the appendix to the Report of the late Irish Land Commission, part 4, p. 331. The learned lecturer dilates in very graphic terms on the evil effects of legal fictions.

"In reading ancient and learned books on the common law (says Dr. Longfield) we frequently meet with what are called legal fictions, on which in general the highest praise is bestowed by the authors who describe them. This praise of legal fictions has even become a maxim of the law, which, to make its appearance more imposing, is generally delivered in Latin. '*In fictions juris semper subsistit equitas.*'"

Dr. Longfield however differs with the authors of the ancient and learned books about the *equitas*, for he declares,

"Investigation has led me to the conclusion that our legal fictions owe their origin to imperfect legislation, that they are clumsy modes of attaining the ends at which they aim, and that the whole system of fictions is more productive of injustice than of equity."

He proceeds to observe,

"This result might perhaps have been anticipated beforehand. It would be very extraordinary indeed if any object could be accomplished by fiction that could not be better attained by truth, and the law must be absurd or unjust if a false statement is necessary in order to obtain justice."

Dr. Longfield "begins at the beginning" of these fictions, and certainly makes out a strong case against them. He says,

"But it may be inquired, what harm in these fictions? Is not one form as good as another for bringing the defendant before the court, while there would be the same trouble in framing new forms to answer the purpose better? I would answer that the advocate of truth ought never to be called upon to give a reason for his preference of it * * * * The form ought to be changed because it is false."

He dwells with instructive humour upon the ridiculous performances of these litigious worthies Mr. John Doe and Mr. Richard Roe, and observes that "in general the effect of the system of fictions is to give a remarkable character of prolixity to common law pleadings." Dr. Longfield specifies a number of fictions which affect the principle of the law even more than the form. And of these there is one which we feel bound strongly to condemn. We allude to our action for seduction. There appears to us to be something very bad in the fictitious form of this action. The wrong for which it is the appointed remedy is perhaps the greatest outrage that can be committed on society. Yet the law of England takes no immediate cognizance of the real injury, and a father is obliged to resort to the barbarous, coarse and unfeeling fiction of his daughter being his servant, whose services the seducer has caused him to lose by her pregnancy, before he can sue for damages. The fiction here is not, like that in some other cases, for the purpose of giving jurisdiction in the initiative:—it permeates the whole procedure, consistently sustaining it from beginning to end. The consequence is frequently that the wrong committed is left unpunished, and justice is defeated owing to the evidence, although proving, more than proving, the fact of seduction, falling short, or perhaps disproving the point of service! A case was tried on the Western Circuit during the last summer assizes which illustrates this in a remarkable manner. It was the case of *Dingle v. Baker*, tried on the 23rd July, at Exeter, before Lord Chief Justice Wilde. It came out in evidence that the girl was in-

duced by the defendant to leave her home for a few days, and when she came back she did not return to her father's house. Mr. Crowder, Q. C., was addressing the jury on behalf of the defendant, when he was interrupted by the Chief Justice, who is reported to have said,

"That the girl in going away had put an end to the relation of master and servant. The foundation of the action was the loss of service, NOT FROM ANY MORAL CONSIDERATION, but by reason of the inability of the daughter to continue her services through the physical consequences of her pregnancy, and he was therefore of opinion that the plaintiff must be nonsuited."

Think of an English judge in the nineteenth century being obliged thus to speak! The law of Scotland is happily free from the odium of this kind of proceeding. There the action lies to the woman herself for the direct injury, and the "moral consideration" is of its essence. And this has been the Scotch law from the earliest period. Fictions such as this one in our action for seduction take away from the force and dignity of the law, as if the law spoke "with stammering lips" and was afraid of a direct attack.

Pleading ought to be the true and uncompromising practical exponent of the law, and there is something fine in the idea. By such an instrumentality we give jurisprudence a real power and living truth; we draw from its resources, and adapt its principles to the direction and controul of the affairs of life. Within the empire of law, pleading is the executive, justice being the desired administration. Its office then being so important, we cannot be too careful in perfecting its system. We ought to be guided by truth, and avoid the art that is more considerate of form than of just purpose. But at the same time we must include every interest, and make no sacrifice to a convenient simplicity. The simple and popular pleading recommended by some would be found to be quite unsuited to the transactions and exigencies of the present state of society. Its looseness and independence of exact rule would, it is feared, greatly encourage litigation, and the honourable though timid man would be at the mercy of his unscrupulous adversary. Its inartificial character besides would lead to uncertainty, and consequently to a want of authority in judgment. A scientific knowledge of jurisprudence would be practically superseded, and virtually declared to be above the wants of the people. But legal administration should welcome the researches of the jurist. His learning cannot carry itself too far; and with a cultivated science we would have a forensic usage which would be, in the language of Lord Coke, *ipsius legis viva vox*.

R. S.

ART. II.—CONTRACTS—DELIVERY AND ACCEPT- ANCE OF GOODS.

WE intend to give a series of these articles; in each of which we shall strive thoroughly to probe and determine the most difficult points in the law of Contracts, of which the explanation is likely to be of the most use to County Courts, and those who adjudicate and practise in them.

Most of the cases turn upon the sale of goods, and the various incidents which arise relating to them. We shall adopt the plan of stating, *seriatim*, the cardinal rules which govern the law of this class of contracts, following it in each case with such explanations and authorities as their intricacy or importance may seem to require. It will be found by those who, like ourselves, have had occasion to wade through the wilderness of cases which encumber and obscure the law on so many of these points, that it has been our object to sift rather than cite them—to gather their full spirit and true bearing. The law is laid down by a few great judges, past and present, under each phase of facts, with an avoidance of much that is doubtful or immaterial in the vast volume of cases and judgments which crowd our Reports, to the confusion of the practitioner and the benefit of injustice. It is highly expedient that principles rather than precedents should be relied on: nevertheless we shall take care to refer to all cases which are at all likely to be cited in argument, and show where they appear faulty when they conflict with the rule deduced from higher authorities.

In the sale of goods the law differs in respect of those of which the price is above or under 10*l.* in value, seeing that the 17th section of the Statute of Frauds invalidates all contracts for goods sold for 10*l.* or upwards “except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.” This statute applies simply to goods of 10*l.* or upwards which were the subject of one contract and one transaction; the great bulk, therefore, of the contracts sued on in County Courts and elsewhere do not fall within the Statute of Frauds. The great practical distinction between the two cases is this: in the one there must be an actual or constructive acceptance of the goods sold, and in the other there need not. Where the price of the goods is under 10*l.* the

law is satisfied with a simple sale or bargain, and will enforce its completion on either side; in that case, it will compel the payment of goods sold and delivered without proof of acceptance; in the other it will not, unless there has been either actual acceptance or one of the equivalent proofs of the contract mentioned in the 17th section above cited.

I. Delivery is, in both cases, an essential requisite. Goods must be delivered by the seller before he can sue for payment, but non-acceptance by the buyer may be, and often is, the ground of the action; as where an article is ordered under 10*l.* in price, and being delivered according to order is refused by the buyer.

The delivery must be such as to give the buyer actual or constructive possession, so that he has full power to deal with them as his own, or they must have been delivered in such manner as he has directed.

Thus, as laid down in the case of *Bryans v. Nix*, 4 M. & W. 791, by the Court of Exchequer,—

“If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether that depositary be a common carrier or ship master employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected.”

Thus any act which, in virtue of a sale, divests the seller of his right to deal with the property as his own and invests the buyer with it, is a delivery. In cases of delivery to an agent, the only question is whether the agent holds for the buyer or the seller: if for the former, the delivery is complete; if for the latter, there is no delivery; because in the former the goods are in the power of the buyer, and in the latter they are not. Cases in which this distinction occurred will be found in *Bentall v. Burn*, 3 Barn. & Cres. 423; *Bill v. Baiment*, 9 M. & W. 36; and also in the case of *Elmore v. Stone*, 1 Taunt. 458, where the seller had merely shifted a horse which he had sold from one stall to another where he intended him to stand at livery for the buyer. This was held to be a delivery, because the seller had thereby parted with his lien and had put the animal at the disposition of the buyer.

It is equally delivery where the seller delivers the property in the manner the buyer has directed, although it has *not* come into his possession and immediate power. Such deliveries occur wherever the goods are given to a carrier specified by the seller, the *delivery* would be complete; *Peck v. Dawes*, 8 T. R. 330; *Richardson v. Dunn*, 2 Q. B. 218. The buyer might not

have possession in this case, for the carrier would have his lien for freight, but here the seller would have equally parted with his lien and have done what he was directed to do in order to give the buyer the power of possession. This done, the seller may sue for the price of the goods thus constructively delivered, whether they have reached the actual possession of the buyer or not. But where the seller shall have selected his own carrier he is the seller's agent, and the goods are neither constructively nor actually within the power of the buyer, and there is no delivery until the goods are placed within it. The same rule does not apply with respect to delivery or non-delivery in these cases as in those where the right to stop in transitu occurs, for it may survive the right of lien and property in the seller, and exist after the constructive delivery is complete. The two rules are, therefore, distinct, and must not be confused.

The delivery must be made at a reasonable time after the contract, and, in the absence of any express agreement on this point, the jury is to judge of what is reasonable time; *Ellis v. Thompson*, 3 M. & W. 453. If a given number of days are assigned for the completion of goods and their delivery, they must be delivered at a sufficient time before midnight, to enable the receiver to receive and weigh or examine them. And the usages of trade are to be considered in estimating whether the circumstances of the delivery do or do not comply with this requirement. See the case of *Startup v. Macdonald* (in error), 6 Man. & Gr. 593.

II. There must be delivery, as well as sale, to give the seller a right to sue. But the question of *acceptance* arises chiefly in determining the validity of defences. If the acceptance has been complete there is no valid defence short of fraud for goods once sold and delivered.

There has been acceptance wherever goods duly delivered have been long enough in the buyer's actual or constructive possession to give him the means of testing the goods, and ascertaining whether they are according to contract.

If the goods have been duly delivered (though it be a mere constructive delivery) the question of acceptance turns wholly upon time.

The common law requires delivery under *all* cases before the seller can sue for payment. The Statute of Frauds requires acceptance only where the goods are above 10*l.* in price, and, as far as this goes, it requires very little if anything more than the common law requires: for *wherever* there has been a delivery, acceptance ensues where the goods are not repudiated within a

certain short space of time. The same test or rule applies as to what is delivery in both cases alike. The only substantial difference effected by the statute is this,—that when goods are delivered to the buyer according to order, they can, nevertheless, be repudiated if they are above 10*l.* in price, and if there be no written contract or part payment, and they can not be repudiated if they are under that price. This, though it is not the fashion of our text books to probe the principle or effect of these distinctions, is in reality all that the statute does. It says to the buyer you shall not be bound by a verbal order for goods of above 10*l.* price, unless you have done something more to attest the contract.

Acceptance being tested in all cases by the same laws, let us see what they are. Lapse of time after due delivery determines what is acceptance. Therefore there are but two questions in each case: Have the goods been delivered according to the rule already examined; and, if so, has a sufficient interval elapsed to enable the buyer to examine and test them, so in fact as to see whether they are according to contract or not? If so, and he has not repudiated, he has accepted them. This is the law of acceptance. This rule has, indeed, been doubted in one recent case in the Court of Exchequer, but it is strongly upheld in another of equal or greater authority in the Court of Queen's Bench. In the former case of *Norman v. Phillips*, 14 M. & W. 277, the Court thought that an exception should be made where the goods were delivered to a warehouseman, who, though specified as the receiver of the goods by the buyer and his agent to *hold* them, was not his agent to *accept* or examine them; and though the goods had lain *eight weeks* before they were repudiated, the court held that there was no acceptance. The contrary doctrine, in conformity no less with the current of previous decisions than with the usages of trade, governed the decision in the case of *Bushel v. Wheeler*, 8 Jurist, 532. The court held the acceptance complete, and yet the facts were less strong than in the former case. In *Bushel v. Wheeler* the carrier had been named by the buyer, but he refused to receive the goods on their arrival, and they remained with the carrier, the repudiation, however, was not sent till long after. Lord Denman said in his judgment that "the purchaser may depute another person to exercise a judgment for him as to the quality of the goods . . . (and added) it seems to me that there may certainly be an acceptance under the statute which is not a manual one." Where the buyer has the goods within his power, how can the right of the seller be affected by the buyer's laches in examining the goods? If he does not

choose to take them into his own custody, or to cause them to be examined in proper time, it is his own fault, and the buyer, being neither a party to nor cognizant of the delay, has a right to assume that the goods are accepted. The fact is that goods are accepted by mere lapse of time after delivery has once taken place. The amount of that time *is that which is sufficient for the due examination or trial of the goods; and it begins to run from the delivery.*

The law as we have laid it down in all these cases of intermediate delivery is fully illustrated, and in the recent one of *Wilkins v. Bromhead*, 6 M. & Gr. 963, it is confirmed by the following judgment, pronounced by the greatest of modern judges. In that case the plaintiff employed B. to build him a greenhouse for 50*l.* When it was completed, B. gave plaintiff notice, and requested him to remit the price; plaintiff remitted the amount, and desired B. to keep the greenhouse till sent for. Afterwards B. (unknown to plaintiff) deposited the greenhouse with C., telling him that it was the property of A., and requesting him to keep it for A., which he agreed to do. B., having become bankrupt, his assignees took possession of the greenhouse, and trover was brought by the plaintiff to recover it.

“*Tindal*, C. J. said ‘The motion before the court proceeds upon two distinct grounds: the first ground is, that under the contract no property in the greenhouse in question passed to the plaintiff (A.); the second, admitting that the property did pass by the contract, as the greenhouse remained in the possession of the bankrupts, or of *Wait*, down to the time of the bankruptcy, it must be taken to be property in their order and disposition as reputed owners, with the consent and permission of the true owner, and consequently that it vested in their assignees.

“‘As to the first point, there can be no doubt but that a contract for the making of a chattel does not of itself vest the property in the chattel when completed in the person giving the order. But here the question turns not upon the original contract, but upon the circumstances which afterwards took place, viz. the payment by the plaintiff, after the greenhouse had been completed, of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff, and his assent to such appropriation. There was an appropriation on the one side, and an assent to such appropriation on the other, which, I think, was quite sufficient to pass the property to the plaintiff. It may be that the original contract did not pass the property, but the parties may be said to have entered into a new contract. I cannot conceive why, under the circumstances of this case, the property in an article made to order should not pass upon its completion, as it would have done if it had been in existence at the time of the original contract. The objections raised upon this point were mainly founded upon *Atkinson v. Bell*. But if that case

be examined it will be found not to apply. The decision there turned entirely on the absence of assent on the part of the purchasers to the appropriation of the machines by the vendor. It is said by *Bayley, J.* 'These were *Sleddon's* goods, although they were intended for the defendants, and he had written to tell them so. *If they had expressed their assent*, then this case would have been within *Rohde v. Thwaites*, and there would have been a complete appropriation, vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt, and therefore no action for goods bargained and sold was maintainable.' *Holroyd, J.* observes, 'I think the action will not lie for goods bargained and sold, because there was no specific appropriation of the machines *assented to by the purchasers*, and the property in the goods therefore remained in the maker.' And *Littledale, J.* adds, 'There could not be any sale in this case, *unless there was an assent by the defendants to take the articles.*' Looking at the facts of this case, it seems to me that there is complete evidence of assent on the part of the plaintiff to the appropriation made by the vendors. The plaintiff was informed by letter that the greenhouse was finished, and was requested to remit the price. He did so, at the same time requesting the vendors to keep the greenhouse for him until he sent for it. It has been argued that the letter of the plaintiff, desiring *Smith and Brown* to keep the greenhouse for him, was written *before the article was seen*, and that it would be hard if it were held to be such an acceptance as would preclude him from rejecting the article if it afterwards turned out defective in its construction. If a purchaser's assent to the appropriation was shown to have been obtained by misrepresentation, it seems to me it would probably be held to be no assent at all. *But that is not the case here; and although the plaintiff thought proper to assent to the appropriation without seeing the greenhouse, the assent was not the less complete.* Upon this point, therefore, I think that the property vested in the plaintiff so as to enable him to maintain this action."

The words of the Statute, that the "buyer shall accept part of the goods so sold, and *actually receive the same*," are, therefore, not literally construed, and a *constructive* receipt suffices.

Applying this principle as to what is delivery to each case, it merely remains to be inquired how long a time must elapse before the *acceptance* is sufficiently complete to charge the buyer. This is of course in great measure a question for the jury, according to the nature of the article and the custom of trade. Lord Abinger, C. B., has laid it down in the case of *Chapman v. Morton*, 11 M. & W. 534, that where a buyer "intended to renounce the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods;" and this is not a matter in any doubt.

In *Richardson v. Dunn*, 2 Q. B. 218, where the buyer of

coals was informed by invoice and letter that a smaller quantity had been shipped to him than he had contracted for, it was held that silence for a week was tantamount to an assent to take the coals; that such silence amounted to acceptance, and he was liable for the amount in assumpsit for the price; see also *Coleman v. Gibson*, 1 M. & Rob. 168. In *Edan v. Dudley*, 1 Q. B. 302, the goods were already in the hands of the defendant, the buyer, before the sale to him; and the Court held that the jury were to judge how far a conversation and the subsequent disposal of the goods by the defendant amounted to acceptance.

It will be thus observed that delivery and acceptance are totally distinct, and from their nature can never be completed at the same time; for, however short the interval may be, *some* interval must elapse after the delivery of goods, for the purpose of their examination.

Contracts of sale may be repudiated wherever the article delivered does not fulfil the terms of the contract. The cases where the terms are express require little explanation. If a man orders a certain article, specifying how it shall be made, it is sufficient if it be made as he directed; if this be done, it matters not how ill suited it may be to the purpose he had in view: that is his fault and not the fault of the seller. If the buyer's orders are fulfilled he is bound by their defects. Not so if there be material deviations, and what is a material deviation is for the jury to decide. Where, however, an article is simply ordered to be made without any further description than its ordinary name, it must then answer the purpose for which such article is ordinarily designed. Of this *Cousins v. Paddon*, 1 C. M. & R. 547, is a standard case; and evidence that it does not answer its ordinary purpose is a complete defence to an action for the price.

It will be observed, that there are other modes whereby the statute is satisfied of acceptance short of the act itself. One of these is *earnest*. When "earnest," or "part payment," has taken place, the bargain is sufficiently complete to be sued upon, though for goods above 10*l.* in price. The moment this payment has taken place, the property is in the purchaser, and the full payment can be enforced, although the actual acceptance has not taken place. The action must, however, still be preceded by a delivery. The question of this part payment, and how far it has been made, is of course one for the jury to determine. The other mode of binding a bargain for goods above 10*l.* in price is, where "some note or memorandum in writing" of it be "made and signed by the parties to be charged by such

contract, or their agents thereunto lawfully authorized." Without one of these three modes of evidencing a bargain,—acceptance, part payment, or a memorandum,—there is no bargain at all: it is void. The memorandum must name the seller, to identify the bargain, and it must be signed by or for the buyer. The price ought also to be named (see *Elmore v. Kingscote*, 5 B. & Cr. 583); but it will suffice without it, in which case it must be implied that reasonable terms are meant. No particular form of memorandum is required; the intent of the parties that it should bind the bargain is all that need appear, and where there are two or more writings it suffices if the intent so appears. When any of these three modes of concluding a contract exists, it is, as we have said, competent to either party to compel its completion by the other, provided the plaintiff has performed his part of it. The duties of the vendor are to deliver the goods, or what is (and has been treated in the above remarks as) the same thing, is to put them into the possession or control of the buyer according to contract, and to take care that the thing so delivered is that which was bargained for. The duty of the vendee is to accept and pay for the thing so delivered. An action will lie against him for default in accepting as well as paying for goods thus bargained and delivered. If however there be delay in the delivery, so that the goods are no longer of the value or use to the buyer they would have been if properly delivered in due time, or if they be not the sort of goods bargained for,—the buyer is in either case entitled to rescind the contract: in effect the contract has not been fulfilled by the one party, and it cannot be enforced against the other. The bargain in such a case sought to be enforced would not be the bargain *made*. The mode of rescinding contracts is, however, foreign to the branch of the law of contracts we have endeavoured to explain in this article.

ART. III.—REFORMATORY PUNISHMENTS.

Report of the Select Committee of the House of Lords to inquire into the Execution of the Criminal Law, especially respecting Juvenile Offenders and Transportation.

WHETHER it be a pure dearth of other matter as food for discussion in the Parliamentary interregnum, or whether it be a prelude to the actual reform of our Criminal Law, that we must attribute the increased stir on this subject, we will not pretend to determine. Sure it is that seldom has so much been said or written on the question. We have endeavoured frequently to assist in the work, from an honest conviction that nothing is more essential to the general interests of the community or to the character of the nation, and we intend to pursue it in season and out of season.

A very important document lies before us : and inasmuch as it gives the deliberate opinion of our Judges of England, Ireland and Scotland, the Inspectors of Prisons, Magistrates, Gaolers, and others best informed on criminal punishments, we feel it incumbent on us to give full publication to this useful body of opinion, which will derive much weight from the important fact that it is nearly unanimous.

I. As regards THE POLICY OF TRANSPORTATION. The Report says :

“ In the first place, nearly all are agreed that the punishment of transportation cannot safely be abandoned ; that it has terrors for offenders generally which none other short of death possesses ; that no such fear attends imprisonment, especially for hardened offenders ; that no hope exists of imprisonment being so far rendered more formidable as to supply in all respects the place of transportation. There prevails some slight difference of opinion, but more in appearance than reality, as to what classes of criminals dread it the most ; for when one or two of the witnesses state that prisoners in a superior station—as merchants’ or bankers’ clerks, or persons in the law—convicted of forgery, would prefer being sent abroad because they are observed, when under sentence of imprisonment, to have a peculiar fear of being seen and recognised, the same witnesses allow that these individuals, if imprisoned in places where they are unknown, would deem the punishment much less heavy than transportation. The evidence all plainly points to the conclusion that this punishment has peculiar terrors for such persons, and there is only one opinion given by all the witnesses,—or rather one fact stated by them—as to receivers of stolen goods, by whom transportation is dreaded in an extreme degree.”

The dread is no doubt extremely great of this punishment by all but very hardened offenders, but they who have no character, and, in many cases, no friends to lose, must of necessity dread it least, whereas it is expedient that they should dread it most. There are of course exceptions to this rule, and Norfolk Island and the terrors of chain gangs flit as a grim vision more or less vaguely before the eyes of some even of the most hopeless culprits; but we believe that some notion nevertheless generally prevails among this class that there is a chance of ultimate if not immediate improvement in their lot, which compensates in great measure for the prestige of the punishment and the conventional dread of exile. The Report rightly remarks that—

“The degree of weight which may be given to the evidence generally, or to the testimony of particular witnesses, in any discussion upon the administration of criminal justice, must depend in a great measure upon the answer to another question—viz. what particular mode of executing the sentence, either of transportation or of imprisonment, is in the contemplation of the witness or of the persons whose opinions he professes to give.”

Many, doubtless, are influenced by reports of the prosperity and success of convicts who have chosen to avail themselves of the unquestionable opportunity of doing well opened to industry, sobriety, and general good conduct in the colony. The works recently published on Australia¹ leave no doubt on the subject. Convicts are kept down far more by their habitual system of spending their earnings in rum than any other cause. But the knowledge of these facts, and of instances of success, materially diminish the dread of transportation in the mind of the class of prisoners who have least to hope for in England, and whom, we repeat, it is most of all expedient to hold in terror of transportation. This material point is not sufficiently felt by the Committee or portrayed in the evidence. Thus the following opinion must, we think, be taken with some degree of qualification.

“There can be little doubt that a sentence which imports an entire separation for life, or for a very long period, from his criminal associates and from his family, must have a greater degree of terror for an offender than any imprisonment at home, which holds out the hope within a shorter period of rejoining his family and renewing all his criminal associations. But before forming any sound opinion upon the relative merits of these different modes of secondary punishment, it would be necessary to clearly understand and fully to consider all the details through which either one or the other is to be carried into execution.”

¹ “Settlers and Convicts,” “Ten Years in Australia,” &c.

There is no difference of opinion, however, among the witnesses that "it would be extremely unwise to abandon transportation." We think so too. The only question is how shall it be modified both in the preparation for it here and in the mode of its execution in the colony so as to divest it of those atrocious evils with which the present system afflicts both the convict, the home country, and the colony?

Following up the remarks made on transportation (very immethodically interrupted by other matter in the Report) we find it the opinion of the Committee that

"The punishment of transportation should be retained for serious offences; that such punishment should, in some cases, be carried into effect immediately, in others, at a later period; that the first stages of the punishment, *whether carried into effect in this country or in the colonies, should be of a reformatory as well as of a penal character, and that the later stages, at all events, should be carried into effect in the colonies, the convict being for that purpose retained under that qualified restraint to which, under the existing system of transportation, men holding tickets of leave, or conditional pardon, are subjected.*"

The lines we have here printed in italics embody the most important fruit of the Committee's inquiry. It appears to us to be a most sound and wise conclusion. We rejoice exceedingly at the good sense and advanced thought exhibited in this ultimatum. The necessity of reformation as well as punishment is one of the most important and pressing kind. We have adopted punishment without reformation for centuries, and the result has been the growth of the worst species of crime, far exceeding the growth of the population, and in the face of all the efforts made of late years to civilize and moralise the people. We are planting a new world based on crime, and reared in crime, uncorrected, and, in no small proportion, increased in guilt. The fact seems never to have entered into the heads of our legislators that mere naked correction hardens and makes men worse—not better—than before: and that without making them better we do nothing to check crime except by mere terror—one of the lowest and least efficient preventives, as experience amply proves. The effect, however, is doubly increased of the neglect to reform when we people a fresh world with these unreformed criminals! An infinite amount of horrid detail of the crime culminating in the colonies has been accumulated and published. It began, we believe, with the labours of Dr. Whateley. Fresh details were procured by Sir William Molesworth, and volumes have been written since on the subject. But, heretofore, nothing has been done.

The Report on this point says:—

“The Committee must not be supposed to have either overlooked or underrated the alarming state of crime and depravity which appears to have arisen in parts of the Australian colonies, but they think that these evils might be remedied by alterations in the police, the penal, the religious, and the moral system to which the convicts, *after undergoing reformatory discipline either at home or in the colonies*, are subjected, together with such measures as would remedy the existing disproportion of the sexes in the colonies.”

They also say—

“The papers lately presented to Parliament, and referred to the Committee, lead to the inference that in many parts of our colonial possessions there will be a readiness to receive and employ convicts *after they have undergone a period of reformatory discipline* either at home or in the colonies. The accounts received of the behaviour of the prisoners sent out from Pentonville and Parkhurst, and the opinions expressed in the colonies respecting them, are very encouraging on this point.”

It will be thoroughly unpardonable in the government if they neglect this advice. They have now a heavy responsibility upon them. They have first of all to organise reformatory establishments. Every thing depends on this; it should be done *at home*, under the highest superintendence, and with all the aids which the best zeal and skill combined can bestow upon the work. We cannot enter upon the detail of this branch of the subject now; but unless there be express institutions for the purpose, on an extensive and efficient scale, no adequate good will be done. No convict, moreover, can by any possibility be fit for transportation under eighteen months home reformation. The committee very properly object to short terms of imprisonment even for the reformation of juvenile offenders; a fortiori for hardened adult criminals. The question how imprisonment shall be modeled and adapted to this end, is one of great moment. The Committee say,—

“How far imprisonment can be so far altered as to be efficacious, either as preparatory to transportation or as a punishment by itself, is a question of difficulty, upon which little evidence could be given, inasmuch as no sufficient experience has yet been had of the improved systems which are now in partial operation. The evidence all tends to show the great importance of our prison discipline. Solitary confinement ought on no account to be inflicted beyond a very short time, as three or four weeks, with a considerable interval after each week, and only two or at most three weeks during a period of eighteen months or two years. Its effects on both the bodily and mental health are such as plainly to prescribe these limits.

"The evidence also establishes an important distinction between solitary confinement and the discipline of the separate system. For the cure of moral evil time is so essential a condition, that any system incapable of being long continued must fail of attaining its object. For this reason solitary confinement, which cannot be prolonged without injury to the prisoner, must fail. The silent system, as it has been termed, *i. e.* criminals working together in silence, is objectionable as leading to a multiplicity of gaol offences, and inefficient as wanting that power of forcing men to commune with themselves, which criminals especially dread and require. The separate system, where it has been fairly tried, seems to supply exactly what is needed, forcing the mind to self-communion, and allowing this to be broken only by communication with those morally the superiors of the convict. Nor does this system, on the balance of the evidence, appear to the Committee to be inconsistent with the health of the prisoners in body or mind, although on this last point there is a difference of opinion, some witnesses regarding this discipline as hurtful, not indeed to the structure and functions of the understanding, but to the energies of the will. On this subject the Committee would recommend, first, that great care be taken in administering the system of separate confinement with labour; and, secondly, that the number of prisons adapted to the practice of it be multiplied."

The mental and moral discipline is one of still more importance, and is sadly slurred over by the Committee. Without it there is no surety for the permanence of the effects of discipline. As regards the silent system, and the proposed modification of the separate system, "allowing it to be broken only by communion with those morally the superiors of the convict;" this may *tend* to the moral reformation of the convict, nothing leads to it more effectually; but it will not *perfect* the work. Powerful moralising agencies should be continually in operation.

The system adopted greatly abroad of working convicts in gangs and in public, is condemned by the Committee.

"The working of convicts exposed to public view is condemned by most of those who have been consulted or examined, as a practice tending to harden the offender, as revolting to the feelings of the community, and even as calculated to excite a feeling in the convict's favour. The French authorities have with great courtesy and candour communicated to the Committee valuable information upon this subject; and this information, corroborated by a witness examined upon the state of the *bagnes* or places of forced labour in France, leads to a very unfavourable opinion respecting the punishment as there conducted.

"It is moreover clear upon the evidence that this kind of working would tend to undo the effects of any reformatory system which might be adopted prior to such working.

"The objections, however, to this practice are materially diminished if the convicts be employed in remote and comparatively unpeopled 'districts,' such as may be found in some of the colonial possessions of the crown, or in other situations where the labour of convicts may be employed without all the evils attendant upon working under the public gaze."

To the preparatory imprisonment, means must be afforded of giving the necessary useful labour without the galling and needless pain of publicity. Nothing can be easier than such an extension of the industrial system. The Committee finds that,—

"Witnesses of the most competent authority from Ireland are of opinion that the system of employing large bodies of convicts together in the public view could not be adopted with safety in that country, where the sympathy of the mass of the people would be in favour of the criminal, especially in all cases of agrarian crimes, and that it would be consequently necessary to transfer to England all Irish criminals destined to be employed on public works, in case this mode of punishment were adopted."

The same objection we know has been found to exist in Switzerland and elsewhere abroad. The Report states also that—

"both from France and elsewhere, of the evil effects produced by the liberation of many convicts yearly, as their terms of imprisonment expire, would seem strongly to inculcate the necessity of obviating the great inconvenience of setting at liberty in this country on the expiration of their sentences those who had once been convicted of serious crimes.

"It appears that Christiania, the capital of Norway, is so injuriously affected by the proportion which the liberated convicts bear to the population—nearly one in thirty—that the inhabitants have been called upon by the police to provide the means of their own security from such persons. In France, where between 7,000 and 8,000 convicts are liberated yearly, the superintendence of the police (*surveillance*), and the compulsory and fixed residence of the convict, are found very insufficient, especially since the invention of railways. The residence of the liberated convicts is found to be a permanent danger to society. The system of imprisonment (*reclusion*), or of the *bagnes* or *travaux forcés*, is of little effect in reforming, or even in deterring from a repetition of the offences punished, and the proportion of those recommitted for new offences is not less than thirty per cent. Thus, of about 90,000 persons tried in the whole kingdom, above 15,000, or one-sixth of the whole number, had already suffered imprisonment, to say nothing of the corrupting effects produced on the community, even by those who escape a second punishment."

The corrupting effect of the intermixture of released criminals with the populace here seems forgotten. It is very much greater than in France. There, it seems, only 7,000 or 8,000 convicts are annually let loose in a population of 35,000,000, whilst with us at least double that number of convicts, together with a host of lesser criminals summarily convicted, are let loose in England and Wales upon a population of only 16,000,000. So that we are at least five times worse off than France, numerically, in this respect; and if extent of criminal depravation is taken into account, probably *tenfold* worse off.

Some writers (one especially in the "Edinburgh Review" of last July) have unadvisedly represented the principles of reformation and prevention as antagonist; they are not so: no one wishes the reformatory to supersede the correctional discipline; but surely they may be combined, the latter lessened as the former proves fruitful of amendment. We have reason to believe that this subject will be treated at large in a forthcoming work, and shall refrain from doing more than merely pointing out the obvious mischief and mistake of representing two essential elements of efficient punishment as in opposition, or in possible competition to each other.

Correction is needed to secure an awe of the effects of crime, and to minimise the temptation to commit it. Reformation is needed, not only for the sake of the patient, but to prevent him from afterwards contaminating others, and spreading the influences of crime,—a very important consideration for a government professing to watch over the welfare of its people. It is a most important thing that the Committee should so thoroughly appreciate the necessity of reformatory imprisonment as a prelude to transportation as well as a necessary concomitant of any punishment. The Committee say—

"Without raising any speculative question upon the right to punish those whom the state has left in ignorance, it may safely be affirmed that the duty of all rulers is both to prevent, as far as may be possible, the necessity of punishing, and when they do inflict punishment to attempt reformation. The Committee, therefore, strongly recommend the adoption of effectual measures for diffusing generally, and by permanent provisions, *the inestimable benefits of good training and of sound moral and religious instruction*; while they also urge the duty of improving extensively the discipline of the gaols and other places of confinement."

The writer in the "Edinburgh Review" seems to think the reformation of criminals a sort of amiable hallucination, and talks of the difficulty of changing the skin of the Ethiopian and the spots of the leopard. This is written not only in bad

taste, but utter ignorance of the results of experience. The most hardened criminals have been frequently softened and reformed by the mighty economy of kindness and sympathy, one of which the power is but faintly shadowed in the few and feeble efforts yet made to give it success. We wish to see this introduced into all our prisons; at the same time we are no advocates for undue lenience. Reformation and correction must go hand in hand. Captain Maconochie's experiments have, we believe, erred on the side of lenience, or rather in a toleration of conduct which, so far from being the fruit of reformation, were the fruit of non-reformation, to which indulgence was encouragement, and encouragement the direct reverse of the principle he sought to establish.

The maladministration of the penal discipline of the colonies there, is a sufficient reason for carrying on the work *at home*, where efficiency may be secured and abuses corrected. The system of imprisonment here might be made to fit the convict for immediate assignment when he arrived at his destination. The less intercourse with other criminals the better. The evils of assignment have chiefly arisen from the unreformed state of the convicts. They were sent out reeking with all their criminality full upon them, materially increased by the contamination of their associates on board ship.

The plan of sending out convicts after a brief term of perfectly abortive attempts to reform them, without any sufficient means to effect real improvement, and to send them as exiles and not as convicts, has been very properly condemned at home by Lord Brougham, and resisted in the colony. Nothing can be more unjust to the prisoner or to the colonists. It gives no sufficient chance of reformation to the former or of security to the latter. If there is no power to withhold his freedom from the convict when in the colony, there is no check upon him as regards fear, and there has been no means taken to supply its place by moral discipline.

II. With regard to the reformation of JUVENILE OFFENDERS the Report says :

"The evidence throws some light upon the treatment of young offenders. That the contamination of a gaol, as gaols are usually managed, may often prove fatal, and must always be hurtful to boys committed for a first offence, and that thus for a very trifling act they may become trained to the worst of crimes, is clear enough. But the evidence gives a frightful picture of the effects which are thus produced. In Liverpool, of fourteen cases selected at random by the magistrates, there were several of the boys under twelve who, in the space of three or four years, had been above fifteen times com-

mitted, and the average of the whole fourteen was no less than nine times. The opinions of competent judges, especially on the bench, vary as to the expediency of giving to magistrates a power of summary conviction in such cases; but the inclination of opinion is in favour of confining this to professional persons exercising judicial or police functions; or if two ordinary justices should be intrusted with it, to interposing the check of a jury, composed, however, not of twelve, but of three or four persons. It is also the very general opinion that magistrates may safely and advantageously be armed with a power of discharging for slight offences, upon taking the recognisances of parents or masters for the good behaviour of the party. Important evidence will be found in the Appendix, especially from Birmingham and Manchester, in favour of a judiciously exercised discretion in discharging boys, especially when apprehended for the first time. The principal difficulty of giving a summary jurisdiction arises from the difficulty of fixing a limit in point of age, and of ascertaining in each case that the party comes within the line. But the committee are strongly inclined to think that much of this might be got over, even without appointing special justices, by enabling magistrates in petty sessions to exercise the summary power, with the previous consent of the parties themselves to submit to such tribunal, confining the jurisdiction to certain offences, and the punishment to six months' imprisonment, with or without labour, or to the infliction of whipping in the presence of certain appointed officers, with or without such imprisonment."

This appears to have formed the basis of the Juvenile Offenders Act (which will be found after the Digest). A very injudicious modification, however, has been made in the term of the imprisonment, three months having been substituted in the act instead of six. Now if anything is to be done in the way of reformation, it is preposterous to suppose that it can be effectually administered in three months. The Committee state that,

"Seventhly, there is almost entire unanimity of opinion against imprisonment for short terms. There is no prospect of the reformation of any class by such punishments, while their tendency is certain to accustom young offenders to the infliction and thereby to lessen its deterring effects. If, however, it is found in the administration of the criminal law that short imprisonments must still be inflicted, the Committee see no reason why solitary confinement should not form part of such sentences, subject to the formerly stated limitation in respect of time."

Concurrently with this view we have great pleasure in stating that the Committee also find—

"That those who have actual intercourse with convicts are they who feel the least sanguine as to this deterring or exemplary effect of penal infliction, and who lean the most to make trial of punishment as affording the means of reformation. The experiment that has

been tried at Stretton-on-Dunsmore, in Warwickshire, for above twenty-eight years, and similar experiments at Horn, near Hamburgh, and at Mettray, in France, and eleven other establishments in imitation, during the last eight years, afford a highly gratifying view of the efficacy of reformatory discipline, especially upon young offenders.

"Lastly. Upon one subject the whole of the evidence and all the opinions are quite unanimous—the good that may be hoped from education, meaning thereby a sound and religious training, commencing in infant schools, and followed up in schools for older pupils; to these, where it is practicable, industrial training should be added. There seems in the general opinion to be no other means that afford even a chance of lessening the number of offenders, and diminishing the atrocity of their crimes."

If the government after this neglect to put in force a comprehensive system of penal reformation, they will entail upon themselves a degree of responsibility and condemnation which we apprehend they will be loath to incur.

As respects the mode and system of juvenile reformation the Committee seem more disposed to the plan of industrial training adopted at Parkhurst than to the penal schools shadowed forth in the Minutes of the Privy Council. The Committee of the Lords in their Report say that

"Very important evidence has been given in favour of dealing with such offenders, at least on first convictions, by means of reformatory asylums on the principle of Parkhurst Prison, rather than by ordinary imprisonment; the punishment in such asylums being hardly more than what is implied in confinement and restraint, and reformation and industrial training being the main features of the process. Without going beyond the principle which should be followed on this question, the committee are disposed to recommend the adoption, by way of trial, of the reformatory asylums as above described, combined with a moderate use of corporal punishment. The committee also recommend the trial of a suggestion made by witnesses who have given much attention to this subject, that, wherever it is possible, part of the cost attending the conviction and punishment of juvenile offenders shall be legally chargeable upon their parents."

We have now given a concise, but, we believe, nevertheless a comprehensive view of this extremely important and interesting Report, and we believe that no subject connected with jurisprudence more vitally concerns the protection of property or the moral progress of the people. A society might be very advantageously formed for the purpose of promoting this great reform and stimulating the government in the performance of its manifest and imperative duty.

We rejoice to find that a member of our own profession, eminent no less for intelligence than assiduity, Mr. Charles Pearson, M.P., has taken the subject up, and will, no doubt, follow it out in all its ramifications.

III. THE PENAL CONGRESS AT BRUSSELS has held several sittings lately, but it scarcely appears to us that very much light has been thrown on the subject. It is far too much the result of these theoretical debates to uphold or denounce set systems without inquiring into the best modes of adopting *parts* of them in practice, so as to meet the various requirements of the case; for instance, we find the "cellular system" treated as though it consisted necessarily of solitary confinement. It clearly does not: and we have ourselves seen a very excellent modification of it in England, which does not appear to have attracted the notice of the congregated savans of Brussels. Solitary confinement by itself is a far too severe punishment. It does not tend to reformation. On the other hand, any communication with other *prisoners* corrupts: but is there no alternative but perfect solitude? Certainly there is. Counsel and persuasion should be actively plied, whilst counteracting companionship should be sedulously debarred.

M. Suringar (of Amsterdam) gave a sketch at the Congress of that perverted *esprit de corps* which exists among criminals of all ages, by which they take rank in each other's estimation according to the number and enormity of their crimes, and the skill and daring with which they have been committed. It prevailed equally among younger criminals, and he gave instances in which the emulation to surpass their fellows in wickedness had led to the perpetration of the most enormous crimes. While thrown together they stifled in each other all impulses to good, even if they existed. In one case a young thief told him he could not do any thing towards a change for the better without the consent of his comrades. From these circumstances the speaker argued in favour of a separation from their evil companions, and giving them a pursuit and employment, two conditions afforded by the establishments, called agricultural colonies, to receive them after they had undergone a certain term of imprisonment. He hoped the Congress would not be allowed to separate without doing something to produce a practical result—without establishing something like the colony at Mettray. We hope so too; but we confess that we wish some more practical insight into the requirements of the case which had enlightened the Congress. By far the most instructive fact of the proceedings seems to have consisted in the following visit to and description of the prison of Vilvorde:

"It is calculated to contain 800 inmates, and at the present time is tenanted by 750. The discipline enforced is that of the prison of Auburn; that is to say, the inmates work together at different trades during the day, but in profound silence and without communication

with each other, and are separated at night. Their occupations are tailoring, shirtmaking, spinning and weaving; there are also carpenters' and smiths' workshops. The appearance of a large hall full of men, each perched on his small table, sewing away at a coat or shirt, silent and active as a machine, is singular, but by no means cheerful. The activity does not seem to be that of real life, rather of some dismal imitation of it; and just as little is the silence that of thought. But the physical appearance of the men was good, most of them being healthy and ruddy. All the *ateliers* were visited, the appearance of so many strangers breaking at least the monotony of one day. From these we passed to the sleeping cells and the infirmary; the last consists of two large chambers, the beds divided by wooden partitions, and railed in in front by a light wire lattice, so that the patients seem to be confined in cages. There were thirty sick, but, with few exceptions, they were dressed, and standing up in their separate cells, inert and listless. It would have been a relief to see one of them reading, or to have perceived anything like a book lying about; but the 'death in life' aspect of all of them was still more painful than that of the spellbound workers in the hall below. The laundry and the kitchen were next inspected: it being fast-day, soup without meat was the dinner of the day; it was standing in large vessels ready to be served out; every copper and utensil was scrupulously clean and bright. To reach the kitchen, an inconceivable number of corridors, staircases and passages, were traversed, for the building covers a very large space of ground. The chapel is an open space, where the eating-rooms of the prison intersect each other. The warders, under whose inspection the prisoners work, are mostly young men, members of a religious order, the Brothers of Mercy, who wear a black robe, with a cross on the breast; a rosary at the girdle and a small skull-cap complete their costume. They had mostly a stolid and heavy look, and inquiry does not elicit very favourable opinions of their intelligence. The service is sought by a humble class of men, who, by entering a religious order, are exempted from the conscription; *and in some cases they are said to be more ignorant than the prisoners themselves.*

"Though this prison is allowed to be well managed, it by no means satisfies the more enthusiastic of the Congress; the discipline, they say, is not sufficiently 'reformatory.' The inmates under sentences of confinement, varying from five to ten years, are taught nothing, labour through their terms like machines, their bad dispositions repressed by the discipline, but neither changed nor improved, and at the end of their time they are cast on society unprepared for an independent mode of existence, probably unfitted by the habit of years for any life but that led within the walls from which they have just emerged. So on leaving Vilvorde, the Congress returned to Brussels, more determined than ever to advocate the separate system."

We highly approve of their decision. Let it however never be forgotten, that mere separation is not half what is required.

It is simply a preliminary to reformation, not reformation *itself*. *We must have a proper class of officers trained to the work, and paid for the work.* Their offices, together with industrial employment and severance from corrupting companions, will effect all that can be done, but nothing less will do it. No stolid "brothers of mercy" will suffice for the administrators of reformation. We want far higher agents. When the work will be begun in England, we know not, but a more disgraceful scandal than the present state of our prison discipline does not exist in this kingdom, nor is there the slightest excuse for its continuance.

ART. IV. — GENERAL PRINCIPLES AND ANOMALOUS CASES.

REQUEST some non-professional friend to go with you into a well-stocked law library. When you have got him there, open before him the ponderous statutes at large, next show him all the treatises you can place your hand upon, then point out to him the almost interminable series of reports, from the days of the Plantagenets down to the sixteenth volume of Meeson and Welsby; and having done this, bid him give you his opinion as to whether, in so prodigious a mass of book-bound law, there is or is not something to suit every case that can possibly arise. Supposing he has conversed much with you or any other lawyer on legal subjects, he may probably doubt the sufficiency of the immense store of erudition thus submitted to him. But supposing he has not had any such advantage, then we venture to affirm that he will at once reply that there *must* be law enough, and more than enough, to furnish a rule adapted to every combination of circumstances in mortal existence. So also, we think, the lawyer himself would be disposed to believe, did not daily experience teach him the contrary. He however toils not long amidst the practical duties of his profession, before he gains at least this piece of knowledge. For how very often, notwithstanding the help he derives from text-books, digests, and other similar aids to reference, does he search for hours, and even days together, without finding anything in point with the case he may happen to have before him! He thus arrives at the knowledge of a truth which he might perchance discover by means of *a priori* arguments, but which he can fully comprehend only under the guidance of that most infallible of all instructors—experience. He at

length comes to know that legal science is not merely vast and comprehensive, but huge, boundless, and infinite as are the varieties of circumstances to which it may be applied.

Judging of the future by the past, it seems to us utterly beyond human power for any man to anticipate half the additions which but a very few years are likely to make to our legislative and juridical collections; for with the march of civilization the statute-book must progress. The ever-changing condition of society requires fresh laws adapted to its fluctuations. The novel positions in which men may be placed with regard to one another, will compel them, again and again, to have recourse to the judges to pronounce the decisions of the law upon rights left almost untouched by the myriads of adjudications previously recorded.

If we look at the legislation of the last thirty years, we cannot but be struck with the faithful history which it presents of the national progress. Yet any one who bears in mind the fact that legislation springs from circumstances chiefly—not from theories and opinions only—will find much among the statutes during that period which he would naturally expect to see when he considers the recent increase in our mercantile transactions, the extension of our commerce and manufactures, the vast monetary dealings of the country, and the novel interests which are daily coming into being. In illustration of our meaning we need only refer to the various statutes relating to Bankrupts and Insolvent Debtors, the Factors Acts, the Bankers Act, the Bank Charter Act, the Ship Registry Statutes, the Acts relating to Merchant Seamen, the various enactments relating to Joint Stock Companies, Loan Societies, Benefit Building Societies and Friendly Societies, and the Clauses Consolidation Acts.

If during the present generation we have had new laws so numerous and important as these—and the list might easily be much extended—what may we not, or rather what *must* we not augur with respect to the augmentations of the next? For the spirit of enterprise which has latterly been so active is not yet lulled to rest—peradventure it has more vitality than ever. The mighty energies that have been long at work are hardly yet in the midst of their labours. The wonder-working principle of association, which has already achieved marvellous things, is yet but in its infancy, and will doubtless hereafter accomplish still greater miracles. All these will certainly afford much occupation to future legislators.

Then again with respect to “judge-made” law, as we have before observed, new combinations of circumstances will occa-

sion fresh appeals to the judges, and consequently fresh decisions. And not only so, but as drowning men catch at straws, dishonest and insolvent debtors seize on every point which may afford them the slightest chance of permanent or even temporary escape from satisfying a just demand. Thus it will often again happen, as indeed it has sometimes happened before, that the judges will have to decide questions which no one beforehand would suppose could possibly come under judicial consideration. By this means the Superior Courts are made to preside over, and finally to settle, disputes more within the province of the schoolmen than of lawyers. A tolerably good example of the sort of case we mean may be found in 16 Law Jour. Rep. 341, Q. B., *Richardson v. Chasen*. There the question was one over which logicians might have puzzled their brains till doomsday. But to the Queen's Bench it appeared so simple that they made an end of it without a second argument, or even a *Curia advisari vult*. The case was this. An action was brought for breach of an agreement to assign a lease, and the plaintiff alleged as damages that he had been "put to expense" in investigating the title, &c. And the question was, whether under this allegation he could recover the amount of his attorney's bill, which was not actually paid before action brought. The argument turned upon the meaning of the words, "put to expense;" the one side contending that the phrase imported actual payment; and the other side, that it signified no more than a liability to pay. The latter interpretation was adopted by the court. Lord Denman's judgment, which we think perfectly suitable to the occasion, is curious enough as showing the embarrassment which even a learned man feels when he is called upon to give reasons for what seems quite as evident as that two and two make four. His lordship is reported to have said, "If the plaintiff alleges, in distinct terms, that he paid money, he must prove such payment; but if he merely says that he has been put to expense, *I do not see that we can say that such an allegation amounts to anything more than a statement that the plaintiff has been put to, or has incurred the liability to pay, certain expenses.*" Here then is a solemn decision—not upon technical words, but—upon ordinary language. And the case now forms a portion of the law of the land, which is thus extended to a simple colloquial expression which few laymen would suppose likely to come under forensic cognizance. No wonder, therefore, that this portion of our jurisprudence should grow "bulkier and more bulky still," without ever attaining that degree of comprehensiveness which would suffice to include every case that might possibly arise.

Having then to deal with a *corpus legum* so immense, and yet so incomplete, how can the votaries of Themis most successfully pursue their vocation? This is a question which has occupied the attention of lawyers for ages past; and they have frequently confessed that it would be the work of more than a life to "read up" *all* the books, and that if a diligent student *could* read them all up, he would still have but an imperfect knowledge of the law. It has therefore long been a canon of legal education, that the student, who wishes to become a lawyer, should first of all make himself acquainted with general principles. And surely if in former times there were any reasons adducible in support of such a rule, they still exist and carry with them tenfold weight. For if, when the law was far less voluminous than it now is, the student was unable to master its practical details without first gaining a knowledge of its principles, how much more difficult must the task be to him now; in consequence of the augmentations we have just remarked.

An acquaintance with general principles will be found useful in a variety of ways. But as regards two things of great importance, it is eminently advantageous. These two things are the acquirement of fresh legal truths, and the right employment of legal science generally. Towards the acquirement of other legal knowledge, beyond that of principles, the knowledge of principles themselves will afford assistance in these particulars: it will enable the student to form a philosophical conception of the nature and scope of jurisprudence; it will aid him in gaining a clear and comprehensive view of the system as a whole; it will assist him in observing the mutual dependence and congruity of its parts; and will thus facilitate the accomplishment of that which ought ever to be aimed at by the scientific lawyer in all his daily studies and midnight lucubrations,—namely, the forming of a right estimate of the value and soundness, the bearing and effect, the results and consequences of each new doctrine of legal science coming under his consideration. He will thus be able so to classify all his acquisitions that they may impart to one another the greatest possible value, while at the same time they may, all and every of them, be most readily available whenever required either for the successful prosecution of future studies or other purposes. Moreover, when the habit of estimating and classifying, which may thus be acquired, is fully established, the lawyer will then possess a faculty of almost inestimable worth. He will not only be able to estimate and to classify, but he will also be able carefully to treasure up or boldly to reject, without fear of encumbering the storehouse of

the mind with what may be useless or injurious, and equally without risk of casting away anything which, if retained, might some day be turned to good account. He will know what to remember, what to forget,—what to remember accurately and completely, and also what barely to keep in mind.

Then, as respects the practical employment of legal science, an acquaintance with general principles will be found no less important. It will be useful, if not absolutely indispensable, whenever the practitioner cannot find a case “on all fours” with the one he may have under his consideration. It will enable him to see at once, and clearly, how far any case somewhat similar may apply, and whether it is to be taken as an authority *pro* or *con*, or altogether rejected. In short, without some knowledge of general principles, it would often be difficult and almost impossible for him to perceive those remote analogies and latent distinctions existing between cases more or less in point, on the detection of which so much will frequently depend. Where there is no case in point, nor any bearing more or less closely upon the question which the practitioner has to resolve, then he must betake himself to general principles; and if he be a stranger to them, he will, as a matter of course, be brought to a *nonplus*. Of the truth of this, as also of most of the preceding remarks, we think the great majority of well-informed lawyers are perfectly conscious; and therefore we feel that it is at the risk of being charged with uttering truisms, that we have said so much in support of positions which we know will not be disputed by any reflecting mind. That risk, however, we are willing to encounter for the sake of protecting ourselves from being misapprehended, which, in the absence of the precautions we have taken, might possibly have happened; for, as the remarks we are about to submit will be of a somewhat different character from those already made, we might, without them, have been supposed to undervalue that to which, with due qualification, we are as willing as most folks to accord a sincere and hearty panegyric.

We shall now venture to approach what may be termed the *contrà* side of the present article; and, after what we have before stated, we do not fear to acknowledge frankly, that we have been tempted to come forward on this occasion because we have in fact seen general principles over-estimated. We have noticed men sometimes relying most complacently upon their knowledge of the first rudiments of legal science. Whether it has occurred through indolence or through an overweening confidence in their mother-wit, we know not; but certain it is that we have observed not a few in both branches

of the profession, seemingly content with the acquisition of the elementary principles of jurisprudence, who never appear to trouble themselves with any details or minutiae beyond those comprised within the usual routine of ordinary every-day practice. And what is the consequence? sometimes grievous damage to the interests of a client; for if in the prosecution of a suit, there chances to be anything but "plain sailing," the mere elementary-principle-gentlemen are quite "at sea." And we have occasionally been pained to witness a just cause of action, in one case, and a *bona fide* good defence in another, entirely fail through what we dare not characterize by a milder term than the wilful incapacity of those engaged in the proceedings.

Moreover, where inattention to any particular points of practice exists generally among the members of the profession, great uncertainty as to what is the practice upon those points must of necessity prevail, and serious irregularity will be the unavoidable result; and we may at length find, as in truth we have already found in some few instances, the accredited books of practice saying one thing, and the judges saying another. We speak not here of decisions overruling former decisions, but of decisions wherein the judges have grounded their adjudication upon what they have always *understood to be the practice*, and which has been the direct opposite of what has been laid down in the most extensively approved text-books on the subject.

Again, it may happen that a course of proceeding, not defined by any statute or rule of court, but left in a great measure to the discretion of practitioners, will be disapproved of in some particular by the courts. In all such cases the really wise lawyer will notice and remember the disapprobation so expressed; and, if thereafter engaged in a similar proceeding, he will carefully endeavour to avoid a repetition of the fault. For if he should not, the court may grow wrathful on the second occasion, and deal with the matter in a summary way, so as to teach him by dear-bought experience that what is not done well, is not done at all.

Cases of this kind should be sedulously noted in a man's books of practice, if they are not treasured up in his mind, where, indeed, they ought to find a place with his other legal acquisitions, should there be room for them. But, in addition to the above, there are others, with perhaps even superior claims upon the lawyer's powers of memory: these are novel decisions on points likely to be of frequent occurrence, and with respect to which little or no help can be obtained from statutes, rules of court, legal analogies, or general principles. In the same category we may likewise place all anomalous cases, whether

they be clear exceptions to general rules, or simply deviations from general principles, or only positions contrary to legal analogies.

Of the several kinds of cases above alluded to, we now propose to lay before the reader a few examples, with a respectful recommendation—as regards the more important ones at any rate—that, supposing he has not already made them his own, he should take some pains to do so hereafter.

The first case to which we shall refer is that of *Gibbs v. Ralph*, 14 M. & W. 804, a decision upon the effect of a proceeding by no means uncommon. We mean the withdrawing of a juror. In the case just named a rule had been obtained, calling upon the plaintiff to show cause why the proceedings in the action should not be stayed, with costs to be paid by the plaintiff, on the ground that it was brought contrary to good faith, a former action for the same cause having been terminated by the withdrawal of a juror at the trial. It was stated in the affidavit of the defendant's attorney, that a juror was withdrawn by the consent of the counsel on each side, and that there was a distinct understanding that all further proceedings should cease. The affidavit of the plaintiff's attorney, on the other hand, stated that no such understanding existed, *and that he was not aware that the withdrawal would preclude him from bringing a fresh action.* The court, however, held that it must be taken as a positive rule of practice, that when the parties to a cause agree to withdraw a juror, it puts a final end to the litigation between them; and, whatever the understanding between the attorneys may be, no future action can be brought for the same cause. The rule was accordingly made absolute. It is strange how any misapprehension could have existed upon a point of ordinary practice like this; and it is stranger still that it should have prevailed so far as to have crept into some of the books of practice, as in fact it has. For the future, however, it is to be hoped that both counsel and attorneys will know what they are about when they agree to withdraw a juror.

Now as to another proceeding of not unusual occurrence. Whenever a court of quarter sessions, on the trial of an appeal, finds it necessary to state a case for the opinion of the Court of Queen's Bench, the former should, so far as it is able, make an end of the appeal, and not order it to stand rescripted until after the opinion of the superior court has been obtained. Therefore where the sessions quashed an order of justices for the removal of paupers, subject to a case in which it was stated that certain evidence had been rejected, and that if the Court of Queen's Bench held it admissible, the appeal should go back to the

sessions to be reheard; the superior court refused to send the case back and quashed the order of sessions. *Regina v. Stoke upon Trent*, 5 Q. B. 303; *Regina v. The Justices of Kesteven*, 3 Q. B. 815. In the former case, Lord Denman, C. J., observed, "The sessions have requested us, if we think the evidence was admissible, or either of the questions proper, to direct a rehearing of the appeal; but we do not approve of this manner of stating a case, and cannot consent to send the matter back to the sessions." Here we have a proceeding rendered futile by the improper mode of conducting it. A similar effect resulting from a similar cause may be noticed in *Regina v. The Inhabitants of Macclesfield*, 3 Q. B. 822, note, where the concluding paragraph in the case was, that if the court deemed the examinations sufficient, the sessions should be directed to enter continuances and hear the appeal. The court refused to have the case argued; Lord Denman, C. J., remarking that the sessions had no right to direct an entry of continuances without the leave of the court. Practical hints such as these ought never to be forgotten.

Most of our readers are doubtless aware, that the marginal note required in all demurrers will in general be considered sufficient, if it refer to the causes assigned in the body of the demurrer, *where the demurrer is special*. But in the Court of Queen's Bench, the judges some time ago having on one or two occasions intimated a wish to have something more specific, refused on a subsequent day to hear certain demurrers that were in the list, simply because in the making out of the demurrer books the suggestions of the court had not been attended to. Any practical man, who wishes to be really "up to the mark," will be quite as careful to remember these little peculiarities in the practice of the courts, as he will be to keep in view the great landmarks of the law.

One other example taken from the above class, and then we shall proceed to some of a different order, which we had chiefly in contemplation at the outset of our remarks. The stating of a special case by order of *nisi prius*, being a thing of frequent occurrence, *James v. Crane*, 8 Law Times, 144, should be noted by every common law practitioner. It is to the effect that questions of fact should not be left for the decision of the court in banco, unless they arise and are incidental to points of law about to be discussed before the court. It was there remarked from the bench, that the court had once or twice before complained about having mere questions of fact left for them to decide, under the name of a special case; this was another precisely of a similar description, and the court took this opportunity of again observ-

ing that such a course was highly improper The mode was an extremely inconvenient one, as they did not sit there for the purpose of disposing of questions of fact, but of law, and points of law only should be raised for their determination The court hoped such a course would not be adopted for the future.

In the selection of cases which we are about to submit, we have been guided by the following considerations, namely, the greatness of the inconvenience or damage resulting from mistake, the frequency of the proceeding out of which the question has arisen, the degree of misapprehension which appears to have prevailed upon the point, and, "last though not least," the anomalous character of the position finally established. It is seldom, however, that all these considerations have concurred to recommend the selection, but generally speaking, two or more have existed in each of the cases chosen.

In the absence of sufficient reasons for a different arrangement, we shall dispose of them in the following order, which will be found to correspond with the several stages of a common law action.

And to "begin with the beginning," we shall first consider the propriety of

Suing one of several Debtors.

Where a debt is due from two or more persons to another, it is not unusual to commence an action against one only of the debtors. And if the debt be several as well as joint, this may be a very prudent course to pursue, as also much more convenient, in some cases, than suing all the debtors together. For although the plaintiff succeeds in getting judgment against the one whom he sues in the first instance, yet if he cannot realize the fruits of it from such defendant, the judgment so obtained and remaining unsatisfied will not be a bar to a future action against another of the debtors. But it is otherwise where the debt is only joint, for it has recently been decided, *King v. Hoare*, 13 M. & W. 494, that an *unsatisfied* judgment against one of two *joint* debtors, is a bar to an action against the other. Therefore in the case of a joint debt, (although the plaintiff, for the sake of some advantage, might be willing to run the risk of the defendant's pleading in abatement the non-joinder of his co-contractors,) it will seldom now be advisable to proceed against one only of the joint debtors, unless the plaintiff be well assured that the one selected is able to satisfy the whole demand.

The next case is one which is likely to be rather important in practice, and is on the subject of

Entering an Appearance sec. stat. for Defendant.

The entry of an appearance for the defendant by a plaintiff who sues in person, is a *casus omissus* in statute 2 Will. IV. c. 39; and such plaintiff has a right to enter an appearance in person for the defendant without employing an attorney to do so, notwithstanding the form provided for this purpose in the schedule to the statute is the following:—"E. F., attorney for the plaintiff, appears for the defendant according to the statute." *Smith v. Wedderburne*, 8 Law Times, 144; 16 M. & W. 104; 4 D. & L. 296.

We now come to a decision which shows that a summons may operate as a stay of proceedings in favour of the defendant, though it does not prevent time running as against the plaintiff. The question arose out of a

Summons for Particulars of Demand.

The case was this:—The defendant, before declaration, obtained an order for particulars of demand, with a stay of proceedings until delivery; and the plaintiff, having for two terms neglected to deliver the particulars, the defendant got an order rescinding his first order, served it, with demand of declaration, on the plaintiff, and, after four days, signed judgment of *non pros*. On motion to set aside the judgment, held, that the non-delivery of the particulars being a default of the plaintiff, he was not entitled to the same time to declare, after the rescinding of the order to stay proceedings, as he was at the time when that order was made; and therefore that the judgment was regular. This must have been rather a provoking "sell" for the plaintiff, but we should say others might have been "sold" in like manner had they been placed in similar circumstances. The case, *Johns v. Sanders*, will be found in 16 Law Journ. Rep. 340, Q. B.

We may also here appropriately introduce the following, upon the waiver of a

Summons with Stay of Proceedings.

Where a summons operates as a stay of proceedings, and the time for pleading has expired, care should be taken not to abandon the summons, either by express notice or by any act which may be construed as a waiver; for by so doing the defendant may be placed in a situation of great difficulty, or, at all events, be subjected to serious unnecessary expense. And to show how easily this may be done, we need only say that the

delivery of a plea before the summons is due has been held to be a waiver of the summons. *Barton v. Warren*, 3 D. & L. 142.

The next case ought to be noted by those who do not accurately understand the meaning of the term

Peremptory Order for Time to plead.

An order "peremptory" for time to plead does not preclude the defendant from again applying by summons for further time; and if he take out such further summons, judgment signed for want of a plea, after the summons is returnable, is irregular. *Beazley v. Bailey*, 16 M. & W. 58; 4 D. & L. 271.

We think there are not a few who might have committed the same mistake as the plaintiff in *Beazley v. Bailey*; and we therefore strongly recommend that the point be kept in mind, at all events until it become part and parcel of the text-books.

We now come to a somewhat anomalous case with respect to coverture, as a

Plea in Abatement.

By the 3 & 4 Will. IV. c. 42, s. 8, it is enacted, that no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed, unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. Although these words are very general, it has been held that a plea in abatement of the coverture of the defendant is not a plea within the meaning of this enactment; and the plaintiff having signed judgment because the defendant, in pleading her coverture in abatement, had not complied with the requisites of the statute, the court set the judgment aside for irregularity. *Jones v. Smith*, 3 M. & W. 526.

Here is another exception to the usual practice in regard to the

Delivery of Pleadings.

The rule of Hilary Term, 4 Will. IV. r. 1, directs that no demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the court, but the same shall *always be delivered between the parties*. This rule seems general enough in its terms, but it is not without its exceptions; for it does not apply to a plea in bar to the further maintenance of the action, when pleaded under circumstances such as the following. The cause was entered for trial at the first sittings in term, which commenced the 3rd of November, but was not

in fact tried until the following day. On the 3rd of November the defendant's attorney delivered the plea, pleaded *as in banco*, accompanied by an affidavit that the subject-matter thereof arose within eight days. No notice was taken of the plea by the plaintiff, nor was any issue joined upon it. The defendant not appearing in consequence, the plaintiff obtained a verdict upon the issue previously joined. And the court refused to disturb the verdict, holding that the plea ought to have been delivered to the judge at *nisi prius*. *Payne v. Shenston*, 16 Law J. Rep. 61, Q. B.; 4 D. & L. 396.

Non-assumpsit to a Count on a Bill of Exchange.

Reg. Gen. H. T. 4 Will. IV. prohibits the pleading of non-assumpsit in actions on bills of exchange. It may be remarked as an exception to the above rule, that non-assumpsit is admissible in an action *against an executor* on a banker's cheque drawn by his *testator*. *Rolleston v. Dixon*, 14 Law J. Rep. 304, Ex.; 2 D. & L. 892. Another exception (and perhaps the only other yet ascertained) as respects the same rule is the general issue given by statute (5 & 6 Vict. c. 122), which lets in non-assumpsit to actions on bills of exchange or promissory notes, under the circumstances contemplated by the statute. *Weeks v. Argent*, 16 Law J. Rep. 209, Ex.

Sometimes a good defence may be upset by reason of unguarded admissions; therefore a few hints may be useful to those who are careless about

Admissions on Judge's Order.

Parties called upon to admit documents should take care to ascertain the exact extent of the admissions required of them. Want of caution in this particular may place a litigant in a situation of considerable difficulty. Thus, if an order to admit a bill of exchange is made, where the notice describes it as having been "accepted by one H. B. for the defendants," it is not competent to the defendants to dispute the authority of H. B. to accept as their agent. *Wilkes v. Hopkins*, 3 D. & L. 184. So where the notice was to admit an authority to sell an estate, "signed by defendant," and dated "10th August, 1840," and when the document was given in evidence, the date "August" appeared to be written on an erasure, it was held that the defendant had precluded himself from calling on the plaintiff to give evidence to explain the altered date. *Poole v. Palmer*, 1 Car. & M. 69; and this although the notice to admit con-

tained the usual clause—"saving all just exceptions to the admissibility," &c.

Perhaps we may save somebody expense and inconvenience by drawing attention to the subject of

Changing and bringing back the Venue.

Where the defendant has changed the venue on the ordinary affidavit, and the plaintiff has brought it back upon the usual undertaking to give evidence of some material fact occurring within the county where the venue was first laid, if the plaintiff fails to give such evidence, it is ground of nonsuit. But *How v. Pickard*, 2 M. & W. 373, shows that the objection must be taken at the trial. And in *Clarke v. Dunsford*, 3 D. & L. 618, the question was raised, but not decided, whether it be necessary to produce the undertaking at the same time, in order to sustain the objection. In future it will be wise to have it ready.

Now and then we hear of people shooting at pigeons but killing crows, robbing Peter to pay Paul, being pennywise and poundfoolish, and so forth. Something of this kind may be perpetrated in a

Postponement of Trial.

Where either party has good reasons for it, he may generally procure a postponement of the trial. And it may frequently be worth his while to make some sacrifice in order to accomplish this. But he should in all cases endeavour to count the cost beforehand, or he may at last find that he has paid too dear for the accommodation. Here is a case in point: *Evans v. Watson*, 15 Law Journ. Rep. 256, C. P.; 4 D. & L. 193. It was an action for 2536*l.* brought upon a charter party, by the owner of the vessel against the charterers. The cause stood for trial in July, 1845, but the trial was then postponed upon an affidavit of the defendants stating that certain material witnesses were absent who would be able to prove misconduct in the captain. Upon the 20th February, 1846, the defendants obtained an order to stay proceedings upon payment of the above sum, and the action was so disposed of. The plaintiff, when the order for postponing the trial was obtained, took out a commission to examine witnesses, intending to examine the captain upon interrogatories; but afterwards, taking the opinion of counsel, the witnesses were thought too important to be examined in that manner, and the captain was therefore detained for 300 days. The master, in taxing costs, allowed this witness 97*l.* 14*s.* 2*d.*, being at the rate of 7*s.* a day for 300 days, less 7*l.* 5*s.* 10*d.*

which had been paid him for his attendance on another cause. A rule nisi having been obtained to review the master's taxation, the court held that the sum allowed was proper, and that the plaintiff was not bound to examine the witness upon interrogatories. See also *White v. Brazier*, 3 Dowl. P. C. 499; *Berry v. Pratt*, 1 B. & C. 276; *Mount v. Larkins*, 8 Bing. 195. It seems a pity that so much money should have been spent to so little purpose. And we mention the case rather as an example of the great expense in which litigants may be involved through inadvertence than with any other motive; for the decision can scarcely be considered as exceptional or anomalous; neither is it important as a leading case laying down a rule for the first time, since it appears there was considerable pre-existent authority upon the point. Whilst upon this subject we may throw out another hint which may be generally useful. Where a party obtains an order for the postponement of the trial of a cause on payment of costs of the day, he must give notice of taxation of such costs, otherwise the other party may go on to trial. *Waller v. Joy*, 16 M. & W. 60.

Here is another anomalous practice—

Recovery of Damages accruing after Action brought.

It is true, as a general rule, that the jury cannot give damages in respect of any matter occurring after the issuing of the writ. But this rule, like most others, has its exceptions. And it may sometimes be of considerable importance to bear them in mind. It may therefore be useful to point out one or two cases wherein these exceptions have been recognized. The first that we shall mention is *Ingram v. Lawson*, 8 Scott, 471; 9 C. & P. 326. It was an action on the case for a libel imputing to a vessel advertising for passengers and freights for the East Indies, and to her master and owner (the plaintiff), that she was unseaworthy and in other respects unfit for the purpose. It was held that evidence of the ordinary profits of such a voyage was receivable, and that the jury were properly told that they might take such evidence into their consideration in estimating the probable amount of damage sustained by the plaintiff from the publication of the libel, although the action was brought before the commencement of the intended voyage. Somewhat similar to the above, in point of principle, is the case of *Hodsoll v. Stallebrass*, 11 A. & E. 301. It was there decided, that in an action of tort for wounding the plaintiff's servant, whereby he was disabled from serving, the jury may give damages for the loss of service, not only before action brought but afterwards down to the time

when, as it appears in evidence, the disability may be expected to cease. See also *Goslin v. Corry*, 8 Scott, N. R. 21; 7 M. & G. 342.

The following may be noticed as an apparent and practically, under the circumstances, a virtual exception to a general rule.

Ca. sa., how far an extinguishment of the Judgment Debt.

There are several writs of execution which may be sued out consecutively one after the other until the judgment is satisfied. Thus, after a *fi. fa.*, under which nothing or only a part has been realised, there may be an *alias fi. fa.* and a *pluries*, or a *levari facias*, or a *ca. sa.*, or an *elegit*. But after a *ca. sa.* has been executed no other writ of execution can be had unless the defendant either dies or escapes. Hence the writ of *ca. sa.* is considered an ultimate remedy, and if it does not force the defendant or his friends to pay, the plaintiff usually loses his debt. For, as is well known, if he consents to the defendant's discharge, although expressly upon the condition of taking him again, should the terms of the discharge not be performed, yet he cannot even then arrest him a second time. Thus the taking of the defendant in execution may be considered as a virtual extinguishment of the debt. And so it is *de facto* and *de jure*, if the defendant choose to make it so, except in one case; and that is in the case of a cross demand, in which event one judgment may be set off against the other. And this although the defendant in the one action has been arrested under a *ca. sa.*, and the other has not; for he who has been arrested cannot object that by having gone to prison he is discharged from the amount recovered against himself. See *Peacock v. Jeffery*, 1 Taunt. 426; *Simpson v. Hanley*, 1 M. & Sel. 696.

A sheriff when presiding at the execution of a writ of trial has many of the attributes of a judge of the superior courts. In some respects, however, his authority is more circumscribed, and in one rather important particular, as will appear by the subjoined remarks on the

Sheriff's power to refer.

It is not perhaps generally known that a sheriff when executing a writ of trial has no authority of himself to refer the cause; but *Wilson v. Thorpe*, 6 M. & W. 721, so decides. And that decision was recognized and acted upon in the more recent case of *Harrison v. Greenwood*, 3 D. & L. 353, which affords a good illustration of the inconvenience that may result from misapprehension upon this point. There a verdict was taken by

consent of the parties subject to a reference. Owing to the absence of the referee from town the reference could not be gone into. The plaintiff accordingly gave notice that he abandoned the former verdict, and that he should proceed to try the cause *de novo*; which he accordingly did in the defendant's absence and obtained a verdict. This second verdict was set aside as irregular; and it was held that the first ought not to stand, as it was subject to a reference which had proved abortive, and which the sheriff had no power to order.

In addition to the foregoing we might have submitted a few other cases not less useful to the practitioner; but fearful of unduly protracting this article, we must hasten to our concluding observations. Yet before doing so we beg to invite attention to one other point of some practical importance: we allude to the

Jurisdiction of the Court over an Agreement between the Parties.

There is a late decision upon this subject which may induce some persons to pause before they relinquish a present actual advantage for a prospective one of greater amount, but which may be defeated before the time comes for its enjoyment. The case is *Wade v. Simeon*, 2 D. & L. 658; 13 M. & W. 647. It is to this effect. Where an arrangement is made by consent of the parties to a suit, and in order to carry out their intentions some act remains to be done under the authority of the court, the court has power, notwithstanding such previous consent, to see that such act is proper and allowable. Therefore where a cause stood for trial on the 7th of December, and on the 6th the defendant consented to a judge's order for payment of debt and costs on the 14th, but before that time he discovered fresh evidence, it was held, that the court might set aside the order, and let the defendant in to try the cause. It is true, that under the particular circumstances a new trial might probably have been granted, even if the cause had been tried on the 7th of December, as at first intended, and therefore the plaintiff lost nothing perhaps by the arrangement; but the decision is important nevertheless, for the principle involved in it, although in strict accordance with the dictates of equity and justice, might be applied to cases where the fairness of its application would not be nearly so apparent as in that which was then before the court.

Now, although we verily believe there is no small number of

careless fellows in the profession, we should be sorry to assume that there is any large proportion of counsel or attorneys, calling themselves practical men, to whom the majority of the foregoing cases may have appeared unfamiliar, either as never having been read, or as having been read, yet already forgotten. But if there be any such, one of our objects will have been attained in placing or replacing before them divers useful points. Again, supposing there are any from out of whose memories the cases we have noticed, though at present remembered, are stealthily gliding away, another of our objects will have been attained if we succeed in arresting the progress of forgetfulness with such individuals. But the main purpose we have had in view, when making the above selection (although we have at the same time regarded the intrinsic utility of each particular case), has been to maintain a general proposition. And in support of this we now proceed to offer a few brief remarks. We have already avowed our conviction of the very great advantages resulting from a knowledge of general principles. We are equally staunch advocates for a familiar acquaintance with books of practice, but we go further; we submit that an accurate and vivid recollection of all exceptional, anomalous, and isolated cases, having a bearing upon general practice, should be accounted as no less indispensable. Nay, we think, if a man has not mind enough to compass all these matters, he had better confine himself to the general principles and the particular cases, than give up the latter for the books of practice; for by cultivating a friendship with the index, he can generally find, in any of these, whatever he wants connected with the general routine of business.

Above all, a perfect understanding of those points in regard to which a false step *taken in court* may be ruinous to his client's cause, should be most anxiously sought after. For what satisfaction would it afford a man to be conscious that he could repeat off-hand, like A, B, C, the form of a writ of summons, including its indorsements; and, without an atom of print or writing within a mile of him, go all the way through a long *nisi prius* record, from declaration to surrebutter, cite all the rules of court and lots of cases as to the time allowed for taking the several steps from the issuing of the writ to the day of trial, and be able to give every kind of information as to all the stages of the action, if he nullified every thing that had been done before, by consenting to withdraw the record without obtaining a sufficient security that his client's rights should be respected; thinking that if "the worst came to the worst," a second action might be commenced, though in truth the law

would by no means permit such a course to be adopted? Or, again, what must be a man's feelings who, having battled it well with his opponent till he gets him before the sheriff on a writ of trial, there consents to a verdict subject to a reference, and afterwards finds all his skilful manœuvring frustrated at last through that learned functionary's want of power to refer?

Really we honestly confess, that to witness miscarriages like these at the eleventh hour—*contre-temps* so disastrous just in the moment of victory—does annoy us more than we can say. And unless the parties blundering and those damnified are possessed of much more equanimity than falls to our lot, they must be disquieted still more. It is shocking to see so much learning and skilful practice after all so helplessly stultified. A man may understand perfectly all the old doctrine belonging to the days of *vivâ voce* pleadings and multiplied continuances; he may know what should be the form of a modern plea in bar to the further maintenance of the action; when it should be pleaded, and by what affidavit accompanied; but *cui bono* if he delivers it to his opponent when he ought to hand it in to the judge at *nisi prius*? A man may have Grotius and Puffendorf at his fingers' ends, but what good does that do him if he allows a judgment of *non pros* to be signed against him for lack of knowledge on a point of modern practice? He may have spent days and months in tracing the history of the Civil Law in the works of Heineccius and Gravina, but will that compensate for his ignorance of the daily accretions to our domestic jurisprudence? He may be quite as much at home with the Institutes or the Digest of Justinian as he is with the Institutes of Coke, or the Digest of Harrison, but all in vain if he has overlooked the new points most recently raised and soundly decided in that *officina legum*, the Exchequer at Westminster. In short, he may have read the Novels of Justinian as often as the novels of Scott, and have impartially divided his time between Domat and Dombey and Son, but they will not do without Dowling and Lowndes.

ART. V.—NEW COUNTY COURTS.

A Treatise on the Law of the New County Courts, compiled from the Statute of the 9 & 10 Vict. c. 95, and the Common Law applicable thereto. By Joseph Moseley, Esq., Barrister-at-Law. Stevens & Norton, London, 1847.

THE necessity of providing for the public in many cases a cheaper and speedier mode of enforcing payment of debts and obtaining redress for wrongs than the heavy and expensive machinery of the superior courts, had long been felt and acknowledged. The writ of trial before the sheriff was one step towards assisting the suitor in this respect, but it gave him but a partial and limited relief. A wider jurisdiction to the inferior courts, and the means of obtaining judgments at costs more commensurate with the amount in dispute, were still called for. It was to meet this want and to remove the grievance so previously felt, and which had often operated (where the amount was small and the parties poor) to a denial of justice, that the county courts, as constituted under the 9 & 10 Vict. c. 95, were established. The many thousands of cases which in a very short time have come before and been disposed of by these courts, show how strong was the necessity for such a tribunal and how extensive in their operation they are likely to be if ably and properly conducted. Many of these cases but for these courts would no doubt have been tried in the superior courts, but by far the greater number would never have been tried at all.

Without admitting that the encouragement of litigation (especially amongst the poorer classes) ought to be promoted, yet it is not consistent with a perfect administration of justice that a man should be unable to enforce payment of a debt or obtain compensation for an injury except at an expense far exceeding any thing he could possibly recover. When it becomes wiser for a party to submit to a loss, because in seeking redress from the law he must only increase his loss, be his right to redress ever so good, the law is clearly defective, and too much reason is given for declaiming against it and stigmatising it as a law for the rich and not for the poor. It was necessary therefore that something should be done. The manner in which this has been done, the constitution of the courts and their working, may be, however, open to remark and question. Many think the Act has given too extended a jurisdiction, others complain of the summary way in which cases are disposed of, the total disregard of pleading, the revolution in the law of evidence by

which parties are allowed to be their own witnesses, the destruction of trial by jury, points of law determined and nice legal distinctions leapt over, as it were, by judges from whose decision there is no appeal, without much argument or consideration. The Act certainly is not without blemish, nor is the manner in which it has been carried out unexceptionable, but making allowance for the difficulties which had to be encountered (and these were not a few) much has been done for the benefit of the public. The superseding written pleadings and the substituting notice for certain defences, and the easy and speedy mode in which a cause is brought to trial, are judicious and necessary, since reduction of expense is essential. But though the trial and the means of bringing the parties to trial have properly been made as summary and simple as possible, every means should be used to preserve regularity in conducting the business of the court and of keeping, if possible, uniformity of decisions. The forms and orders prescribed, especially as they are few and by no means complex, should not be utterly disregarded, however praiseworthy the endeavour on the part of the judge to prevent captious objections to technical informality. The law may be administered in a summary manner, but it should still be *the law*, that is, the decisions should be as much founded on and as close to the principles of the law and the established authorities as the circumstances under which they are pronounced and the ability of the judge will allow. This is necessary to preserve respect for the courts and to satisfy suitors. On the first starting of a system so vast as that proposed by the legislature under the County Court Act, many difficulties must arise and faults be discovered by a public whose expectation can seldom perhaps be fully realized. Complaints are sure to be made, but they have not been so numerous as might have been imagined, and on the whole the system has worked well; still complaints have been made and some of a serious nature, and not without reason. The very hasty manner and want of decorum in which cases have been disposed of in some of the courts and the numerous conflicting decisions call for reform. The former cannot be too much deprecated, and should at once be discontinued; the latter, perhaps, is at present unavoidable, and can only be effectually remedied by a court of appeal. Enough, however, has here been said to show the importance of the new measure, the vast quantity of litigation which must come under the jurisdiction of these courts, and the necessity for regulating their practice and the law they may administer by known rules and established principles.

A treatise on the law applicable to these courts must be a sub-

ject not only of interest but of use to all practising therein or who may be brought within the sphere of their jurisdiction—and who indeed are not those?

Mr. Moseley's work, the title of which stands at the head of this article, is therefore one well chosen, and we will at once bring it before our readers. The plan of it we cannot give better than in Mr. Moseley's own words. He says, "in order to obtain as scientific as well as practical a view as possible of a subject which is likely to become of so much interest and importance, and yet one which from its very nature is at present, and for some years likely to remain, in an unsettled and uncertain state, it is proposed in the following treatise, under such titles as may be deemed the best guide to the subject-matter they contain, first to set out in full all the statutory enactments, then to give such comments thereon as may be deemed advisable, and lastly to set out all the common law collateral to or bearing upon the matters treated of under those titles, hoping by these means to anticipate and solve as far as possible the doubts and difficulties which are sure to arise in a scheme so extensive as the present."

The plan and arrangement are excellent, and Mr. Moseley cannot be too much commended for the immense labour and research he has shown in collecting legal learning, as well as for the pains he has taken to make the work useful. We think, indeed, that this labour and research have been carried even to a fault, and have led the author to occupy his pages with a large quantity of matter more curious and learned than practically useful, and which therefore might have been with advantage omitted; for instance, the dissertation on the creation of courts by common law, is interesting but unnecessary. So few persons, we apprehend, will trouble themselves about the appointment of the officers except the officers themselves, and these will generally be contented that they are appointed; and no one will often, if ever, be tempted to look beyond the requisites prescribed by the statute, and to inquire into the right of appointing, and the means and form of appointment declared by the common law; yet Mr. Moseley has at considerable length pursued this inquiry, extending it to a consideration of the oaths to be taken, and the statute law on oaths from the 3 Jac. I. c. 5, to the 3 & 4 Will. IV. c. 82, the whole comprising twenty-one pages. The description of the authority and powers of the judges at common law, and of the ways by which offices are determined at common law, though excellent of the kind, might, we think, for the purposes of the present work, be either dispensed with or at least considerably curtailed. Also, under the

head "Jurisdiction," after two or three pages have been devoted to pointing out how a party is to take objection to the want of jurisdiction of the courts under the statute, no less than seven pages are occupied with a learned essay on pleas in abatement at common law; a subject which, since the new rules, does not frequently engage the attention of the superior courts, and must still less often, if ever, come before the county courts. Again, the county court rules have required the bailiff to make a return to the court of process delivered to him to execute, and we have between four and five pages given of the common law relating to returns of process, which, though very useful in the superior courts, are not likely to be applicable to the practice in the new county courts. And as juries are seldom impanelled to try causes in these courts, there seemed little occasion to fill seven pages with the manner of summoning and the qualification of jurors at common law, especially after the regulations for trying actions by jury in the county courts, as directed by the statute, with the rules framed by the judges, are set out fully, with comments explaining the same. Without numbering other instances, it may generally be remarked that the work, although containing an immense mass of legal information, well fitted for the student, is loaded more than necessary for practical purposes, and would receive improvement from pruning. It is to be also regretted that there is a constant reference to other parts of the work under such general directions as the following: "*post, JURISDICTION, as to place, By common law.*" A reference to the page would be useful, and make the search (which, when continually called for, is always annoying to the reader,) less troublesome. These are what appear to us to be some of the defects. They do not seriously detract from the merits of the work, which we are far from wishing to depreciate, and they are rather pointed out in the hope that their removal, on a future revision, may, if adopted, improve its utility. We will now take a more regular notice of Mr. Moseley's treatise, and the manner in which he has executed his task. The first part of the work consists of the creation and holding of the courts, and of the appointment and duties of the judges and other officers. Upon the nature of the new courts Mr. Moseley says—

"It were difficult to give any legal definition of the new county courts, such as they appear to be from the above enactments. They are not, indeed, entitled to the name of county courts in its strict sense, for the facts of their being courts of record, and of some of their proceedings being so utterly at variance with the common law, as the trial by five jurymen, and in some cases by none at all, would disqualify them from such appellation. And yet by the third section they are declared to be county courts, except as altered by the act.

On the whole, however, the new county courts may be said to be inferior courts of record, the law and practice of which is regulated partly by common law and partly by statute. For, as it is declared that 'they are to have the powers and jurisdiction of the county court for the recovery of debts and demands, as altered by this act,' it is presumed that they will be the same in those respects as the old county court, except as so altered." * * * "The importance of the third section, which assimilates the new county courts to the old ones, is extreme, as it has the effect of letting in the whole common law, which was peculiarly that of the old county court, (*as to the statute law relative thereto, vide supra,*) as applicable to the new county courts, subject to the express alterations of the act, and thereby has the effect of elucidating and filling up, as it were, those imperfections and oversights which must ever exist in so extensive a scheme as that contained in the present measure for local jurisdiction. And although the practice and framework of the new county courts bears but little resemblance to that of the old county courts at common law, yet, as all the general principles of common law are not merely applicable to common law practice, but to most legal proceedings, they will be found more extensive in the application to the new courts than it would at first appear. And these express provisions of the statute are the more necessary, as there is some doubt whether the general principles of common law could be applied in aiding and assisting in the carrying out of jurisdictions which, in some points of view, were diametrically opposed to it, like courts of conscience and courts of equity, to the former of which these new courts in some points, and indeed entirely in matters below forty shillings, resemble."

In the second, and more important part of the work, the jurisdiction of the courts, and the mode of proceeding therein down to the trial and execution, are detailed at length; and throughout the whole the plan laid down in the introduction of setting out the statute with comments, and of applying such of the common law as might bear on the subject, is fully and carefully carried out.

In considering the enactments which declare the jurisdiction of the new courts, it becomes important to determine what is the meaning intended by the legislature of the words "a dwelling and carrying on a business," and what is the place where the cause of action arose, for on these will often depend the district in which the summons is to issue, as well as the right of the plaintiff to sue in the Superior Courts as he might have done if the County Court Act had not been passed. Mr. Moseley has very properly entered on these points, and with his wonted industry and research collected a great deal of useful law upon the same. It would occupy too much space here to quote *in extenso* what he has so written, and we can hardly

do him justice by abridging it. The following passages on this subject, abstracted from different parts, may, however, convey some idea of the manner in which it is treated, and be found interesting.

" In investigating the meaning of the word *dwell*, which is so important a word with respect to the new County Courts, we shall premise by observing, that, from common use and from the frequent dicta if not decisions of the judges, it would appear to be the same as that of inhabit and reside, and that the three words are synonymous. Thus in the case of the *King v. Thomson*, 2 Leach, 77, the court said that as no one had inhabited the house, i. e. slept there (for the goods had been removed into it), it could not be considered a dwelling-house. So in *Rex v. Lyons*, 2 East, P. C. 497, the court said that the house was no mansion in which burglary could be committed, because no one had inhabited it. So, as observed by Mr. Baron Alderson in *Crease v. Sawle*, 2 Q. B. Rep. 882, the court held in Sir Antony Earby's case, 2 Bulstr. 354, that the word inhabiting, as used in 43 Eliz. c. 2, as to poor-rates, meant dwelling. So Lord Ellenborough, in *Rex v. Nicholson*, said that there was no case in which the word inhabitant in the same statute had been held to mean other than a resident within the parish. (Vide per Holroyd, J. in *Rex v. North Curry*, 4 B. & C. 953.) And it was evidently considered by the court in that case, that the word inhabitant, irrespective of the subject-matter as to which it was used, or the context by which of course its meaning might be altered, was the same as resident. By the old law it is said, that a man after living in a place for three days was looked on as an inhabitant. The first day he was a stranger, the second a guest, the third an inhabitant. (Per Lee, C. J. in *Rex v. Sowton Burr*, S. C. 128.) But no authority is given for this, which appears more like a common saying than a legal maxim." * * *

" From the authorities it appears, that a party, in order to constitute a dwelling by him in any particular place, should not, only be staying or sleeping there by his own free-will, but he must also be living there with an intention of continuing to do so, or at least without any intention of departing forthwith, or to which, in case he departs for a time, he has an intention of returning. Thus the word domicile is defined by Vattel to be a fixed residence in any place, with an intention of always staying there, on which a learned Commentor, Dr. Story, remarks, ' It would be more correct to say, that that place is the domicile of a person in which his habitation is fixed without any intention of removing therefrom.' (Stor. Conf. of Laws, sect. 43.) And this word domicile would appear, in its common sense, to be equivalent to our word home, or the place in which a man dwells. For it was said by Erle, J. in *Whitehorn*, App. Thomas, Respond. (7 M. & Gr. 1,) that the word residence as used in the 2 Will. IV. c. 45, s. 29, as to a party being entitled to vote for a Member of Parliament, meant the same as his ' home,' although it had been contended on the authority of Stor. Conf. of Laws, sect. 41, that there was a distinction." * * *

" As the term 'carrying on business,' generally implies the doing so for profit, these words will include all persons who follow any trade, profession, or calling whatsoever, for gain, but not such as live upon their private fortune, without any trading, or calling, or profession whatever. Therefore it would appear that all young ladies and gentlemen, and others, not following any trade or profession themselves, or following it as pupils or apprentices to others, and depending on their parents and friends for their support, whether such friends or no so derive their means from professions or trades, could not be sued in the County Courts as persons 'carrying on a business,' though of course they might as persons 'dwelling,' if such they were. (Vide ante, Jurisdiction, as to Persons, by Common Law, 'Dwelling.') So perhaps servants and all persons working as servants to other persons, and not in business for themselves, could scarcely be deemed persons coming within the common acceptance of the term 'carrying on their business,' though these again might of course be liable to be summoned as persons 'dwelling,' if such they were. (Sed quære.)

" So, no doubt, in order to constitute 'a carrying on of business,' it is necessary that there should be a repeated practice of so doing, or a commencement coupled with an intention to continue it, for a single act or transaction, though otherwise of the nature required, would not be sufficient. Thus in order to constitute a trading so as to render a party liable to the bankrupt laws, he must commence such trading with an intention of continuing it, and a mere isolated transaction will not be sufficient. (See the Cases in Archb. Bankr. 10 ed. 52.) But if this intention exists, the extent of the trading, or sensible amount of business so carried on, matters not. (Ibid.)"

" With respect to what shall be said to be an arising of the cause of action within the district, great and frequent difficulties might have arisen, if the words 'Cause of Action did not wholly arise' only had been used, as it so frequently happens that, in jurisdictions limited as to place, the promise is made within it, but the consideration, performable or performed, without it, or vice versa; and in actions sounding in damages the trespass or unlawful act committed in a place without the jurisdiction, though the damage occurred within it. (Vide post, Jurisdiction, As to Place, By Common Law.) But as the words 'or in some material part' were added to those above, this difficulty has been in a great measure done away with, for so long as any one material part occur without that jurisdiction in which the defendant is then dwelling, &c., the plaintiff's right to sue in the Superior Court will arise."

" As before observed, at Common Law, in all Inferior Courts it is necessary that every part of that which is the gist and substance of the action, must have arisen within the jurisdiction. (Peacock v. Bell, 1 Saund. 73.) And this will be the general rule as to the New County Courts, though it is greatly modified by the statute, and must be considered here. Besides, as before observed, the

cases relative to this point will serve to show what is a 'material point,' so as to give the Superior Courts jurisdiction under the 128th clause. And first of all, the promise must have been made within the jurisdiction, for that of course is part of the gist of the action. Thus where an action was brought in an Inferior Court, on a bond made without the jurisdiction, and judgment and execution obtained thereon, and an action for escape brought against the officer, it was held that the whole proceeding was void, and that the officer was not liable, since the man was never lawfully in his custody. (Vin. Abr. Vol. 7, p. 20.) So the promise must have been performable, or performed within the jurisdiction. Thus where one promised to pay when he came to A. and the declaration did not aver A. to be within the jurisdiction of the court, the court held it bad. (Cro. Car. 571; Jon. 451.) So it was held an error in a judgment, in an Inferior Court, that in an action on a bond, no place was mentioned in the condition where the money was to be paid, and that, therefore, it did not appear on the record whether the contract was performable within the jurisdiction. (Masterman's Case, Styl. 2.) And from these cases it would appear that the contract must be performable within the jurisdiction, and that money, when averred as payable, must be averred as payable within the jurisdiction. And this is important, since it would appear from the forms (see Hennell's Forms,) and the practice of the Inferior Courts as far as the author has been able to observe, that the practice is in general at variance with the above cases, and probably bad. So the consideration of the promise must have been performed and have been performable within the jurisdiction. Thus where plaintiff declared in the Palace Court that defendant had promised, within jurisdiction of the court, to give him 10*l.* if he would procure a certain house for him in Holborn, without averring it was situated within jurisdiction of the court, the judgment was set aside by the Court of King's Bench. (1 Lev. 50.) So where a contract was made within limits of a Borough Court, for a ship to go from such a place, situated without its jurisdiction, to another place without its jurisdiction, a judgment in the Inferior Court obtained thereon was reversed, (Vin. Abr. 7, 20, pl. 2.) For the promise was not to take place within jurisdiction of the court, but in Hamburg, and therefore the court could not inquire whether it was performed."

Mr. Moseley seems to be of opinion, that the County Court of each county, as altered by the act, has jurisdiction over the whole county, except that, for some purposes, this general jurisdiction is limited to the particular district where the court is directed to be held; and that the several courts which may be held in each county are not so many distinct County Courts, but the same court, that is to say, the County Court held for such and such districts. At first we thought that this general jurisdiction was so reduced by the exceptions, that, practically, whether there was such general jurisdiction, or whether each court extended only over the district assigned to it by the orders in council, would

be a distinction without a difference ; but in this we discovered we were mistaken, when, upon further reading, we found the following passages, viz. : "The force of this section" (meaning the 60th section, by which a summons may issue, though the cause of action did not arise in the district) "is to give each court jurisdiction over all cases, with some exceptions, in which the defendant, or one of them, resides or carries on his business within its district, even though the cause of action did not arise there. And this, even though it arose in the jurisdiction of another County Court ; for *if it only arose within another district of that court, semble the court would, nevertheless, have jurisdiction over it, because, as a general rule, the County Court has jurisdiction over the whole county, though the summons, in any particular cause, must be taken out in the court in which the defendant resides, &c.*" So, in another part, speaking of the execution of process by the bailiff of the court, it is said, "It may be executed by him to whom it is directed any where within the jurisdiction of the court of that county, which, *semble, is the whole county as constituted for the purposes of the act.*" By the 61st section of the act, process required to be served out of the district of the court from which it issued, may be served by the bailiff of any other court ; and Mr. Moseley, writing under the above impression, says—

"An important question on the 61st section is, whether, if a summons or other process be issued out of a 'County Court of A. holden at B.,' and it be required to be served within the same County Court as held for another place, or within 'the County Court of A. holden at C.,' it must be served by the bailiff of the second court ; and this doubt turns a great deal on the meaning of the words 'district of the court,' which has been adverted to in a previous part of the work. For, as before observed, the jurisdiction of any New County Court extends over the whole county except for some purposes, and the officer of the court, or any one else, may serve its process anywhere within such county, by common law, and there is nothing in the statute that expressly negatives it. But, as before observed, it is clear that for some purposes at least the jurisdiction of a New County Court over the whole county is cut up into several smaller districts ; and among others for the more convenient service of process, and as all the same ends will be obtained by the process being handed over by the bailiff of the court holden at B. to the bailiff of the court as holden at C., and the evil of the former having to go at a great distance and expense to the parties in the action, as he is to have so much a mile for his trouble, thus avoided, this practice of handing it over to the bailiff of the court as held for such other place, may and should be adopted in such cases."

The question so started is important, as far as it involves a doubt as to the extent of the local jurisdiction of each court as

constituted by the act. We differ from Mr. Moseley, and think that each court district is a distinct court, confined to the limits of that district, and having no operation or power whatever over any part of the county beyond that district, except where expressly so declared by the act. It is but fair, however, to lay before the reader Mr. Moseley's reasons for the position he has taken, and we prefer giving them in his own words,

"It is submitted," he says, "that there is but one County Court in each county as altered for the purposes of the act, though that court is to be held in and for certain districts. Thus in section two it is enacted, that the queen in council shall have power 'to divide the whole or any part of any county, including, &c., into districts; and to order that the County Court shall be holden, &c. in each of such districts. . . . And from time to time to alter such districts.' . . . 'And to alter the number of districts in and for which the court shall be holden.' So in the order in council, made in pursuance of the above enactments, in the 'London Gazette' of March 10, 1847, all the counties of England and Wales are divided into districts as thereafter set out, and 'the County Court of each of the said counties shall be holden for the recovery of debts and demands under the said act in each of the districts into which such county shall be so divided.' So by the 56th section of the statute, 'the judge of each district shall attend and hold the County Court at each place where her Majesty shall have ordered.' So by the 49th section, the common gaol of the county is to be used 'by any court,' *semble* for the whole county. So by the second order in council of the above date, the title of each court is to be, 'The County Court of . . . , holden at . . . ,' inserting in the first blank space the name of the county, and in the second the name of the town, with the exception of the Metropolitan Courts. So the same order, after declaring within what court district detached portions of parishes, extra-parochials, harbours, creeks, rivers, &c., shall be taken to be, declares, 'that every place included within the outer boundary of the court districts so specified and described, shall be taken to be within the jurisdiction of the county court, holden for the purposes of the said act for the county in which the city, town, or place is situated where the court is ordered to be holden, or when such city,' &c. And from these enactments and orders in pursuance thereof, it appears that, except as to the Metropolitan Courts, the County Court of each county extends and has jurisdiction over all the county as altered for the purposes of the act, but that the court is to be held at certain places and for certain districts connected with those places."

"And a difficulty thus arises as to what is meant by a court which has a general jurisdiction over a whole county, and yet is to be 'held for' a certain portion of it. And as a general rule, no doubt, a court 'held for' any given district, is a court having jurisdiction over that district and no other; for the particular mention of that district by presumption excludes all others. But these words, though strong in themselves, must be taken subject to others con-

tained in the context. And as it would appear clear from the enactments and orders as above referred to, that there is but one County Court in each county, though it is to be held at different places, it is submitted that it was not the intention of the legislature by those words to create so many separate jurisdictions, for there is to be but one County Court for the whole county, but simply to import that the County Court should be held for such districts, that is for the convenience of such districts, and for the carrying out of some particular purposes of the act. But although as a general rule the court jurisdiction of each of the New County Courts extends over the whole of the county for which it is created, there is no doubt that, both by express and implied words of the statute, this general jurisdiction over the whole county for many purposes is limited, or if the term may be used, 'cut up' into so many subdivisions as there are districts in such county 'for which it is to be held.' Thus by the 119th section, a jurisdiction is given to the County Court in actions of replevin, and therefore, by common law, such a cause of action, so long as it occurred within the jurisdiction, might have been followed up by a plaint entered in the County Court wherever it was held, for it is still but the County Court for that county. But by the 121st section, it is expressly enacted, that in every such action of replevin, the plaint shall be entered in the court holden under this act for the district wherein the distress was taken. So that the general jurisdiction of the County Court over the whole county is, as to replevin, limited and cut up, if the term may be used, into so many smaller jurisdictions. And not only in cases of replevin, but the general jurisdiction of each County Court in all matters of debts and damages, is subdivided for some purposes among the several districts for which the court is to be held. For by the 60th section, the summons must be issued, and therefore the plaint must be entered, in all cases, except by leave of the court expressly obtained, 'in the district (*semble* out of the court of the district) in which or within which the defendant resides.' And by the word district, as here used, with the context, is probably to be understood such districts as the queen has ordered to be formed out of each county for the purposes of this act, according to the 2nd section. The question however is not entirely free from doubt, as the word district is used in other portions of the statute in reference to whole counties as altered for the purposes of this act."

It appears to us that the doubt and difficulty which has been raised as above will be very much removed by referring to the interpretation clause at the end of the act; it is there said that the words "County Court" shall be understood to mean any court holden under that act, unless there be something in the context inconsistent with such meaning. With this clause for our guide, we think the words "County Court," when occurring in the sections of the act above cited, must not be taken strictly, as meaning the court of the county, or, as of old, the court of the sheriff, but in the limited sense of the court constituted by

the act. It matters not by what name or title the court is known, whether "as the Court of B.," or as the "County Court of A. holden at B.;" it is still only a court having a jurisdiction limited to the district of B. This construction seems to be more plainly the true one, when some of the sections of the act are looked at. By the third section it is enacted, that "every court to be holden under the act shall have all the jurisdiction and powers of the County Court for the recovery of debts and demands, as altered by the act, throughout the whole district for which it is holden; and there shall be a judge for each district to be created under the act, and the County Court may be holden simultaneously in all or any of such districts, and every court holden under the act shall be a court of record." The giving to the court constituted by the act expressly a jurisdiction over the district for which it is holden, is tantamount to denying it a jurisdiction beyond such district, on the principle of *expressio unius est exclusio alterius*; besides, if the court is only a district court of the County Court, and therefore has jurisdiction over the whole county, there could be no necessity for giving it jurisdiction over a district of such county. The indiscriminate use of the words "court holden under this act," and "County Court," throughout this third section, rather shows that the one is considered synonymous with the other, and that no distinction is intended between "a court holden under this act," and "the County Court, as altered by this act;" also the 61st section, which provides for the service of process beyond the jurisdiction of the court, clearly treats such jurisdiction as confined to the district of the court, and which must evidently be the district mentioned in the third section; for it says that any process "which, under the act, shall be required to be served out of the district of the court," may be served by the bailiff of any other court, as if the service had been made by the bailiff of the court out of which it issued, "within the jurisdiction of the court for which he acts." There are other sections to the like effect; we might call to our aid those referred to by Mr. Moseley, as limiting, as he says, the general jurisdiction; but enough has been said on this point; we have stated our opinion and reasons, and we must leave it to others to decide.

It was not to be supposed that a measure so extensive as that of the new County Courts could be long in operation before various nice and important questions would arise. These have not been wanting. Amongst the most prominent is the question, what is a splitting of a demand within the meaning of the 63rd section of the act. It is one which has attracted considerable notice ever since the well-known decision of the judge of the Bristol County Court, and therefore the following pas-

sages, selected from the observations Mr. Moseley has made on the subject, although evidently written before that decision was reported (as no allusion is made to it) may not be deemed unacceptable.

“Where goods have been supplied at different times on credit, and the credit for part of which has expired, but the other not, there would appear to be no reason why a party might not sue for the value of first-mentioned goods without prejudicing his claim for the value of the other goods, ‘for the cause of action’ is not the same, at least if the goods were supplied at different times and not the same bargain, or in pursuance of the same order, though *semble* otherwise if the contrary. So where divers works and services have been rendered in pursuance of one general retainer, as in the case of an attorney conducting a cause, or of a surgeon attending a patient, the non-payment for such work and services and goods supplied, and money in aid and assistance thereof, will constitute one cause of action. But if such work and services and professional assistance were rendered on several distinct times, and in pursuance of several distinct retainers, these will be so many distinct causes of actions, and each may be sued for separately.” * * *

“And for general rule and for ordinary purposes, the sum claimed by the plaintiff in his writ is the debt for which the action is brought. But this is by no means conclusive on this point. For if the amount as claimed in the writ were to be the only consideration as to whether the inferior court had cognizance or no, the plaintiff, by splitting a large demand into several smaller ones, might avoid the precautions of limiting the inferior jurisdiction in amount, and he would be enabled to vex and harass the defendant with an infinite number of suits, and indirectly to oust the jurisdiction of the superior courts altogether. But this of course he cannot do. (2 Inst. 312.) And the real sum for which the action is brought, or the amount of the cause of action that is sued upon, is the whole sum due or recoverable at the time of the commencement of the action on that contract or tort on which the plaintiff sues. (Vide cases *infra*.) And therefore, where a larger sum is due to the plaintiff, but he owes the defendant such a sum as will reduce his demand to an amount within the jurisdiction of the inferior court, yet the first sum is the cause of action, and he will not be entitled to make the set-off on entering his plaint, so as to sue there, for, as said by Lord Abinger, in *Jenkinson v. Norton* (5 Dowl. 76), the statutable right to set-off does not extinguish the debt, but only gives a party power to avail himself of it in that manner.—(See *Penney v. Squier*, 2 B. & Adol. 142.) Besides the set-off admits the existence of the debt, and therefore will not take the case out of the statute. (Per Burrough, J., 4 Bingh. 17.) Care, however, must be taken to distinguish between what, by the terms of the original contract, is to operate as a reduction of the sum to be due on that contract, and what arises by some subsequent contract, and as such is only subject matter of a set-off. Thus, where a plumber brought an action for work and materials found, in the superior court, but it appeared that defendant was entitled to a deduc-

tion for old lead by the terms of the original contract, which made the sum recoverable less than five pounds, and so within the Southwark Court of Request Act, Lord Ellenborough held that this was not in the nature of a cross demand, but a condition of the original contract, and that the sum due on that contract was the amount of work and new lead, minus the value of the old lead. (*Porter v. Philpot*, 14 East, 344.) So where the account contained items to upwards of five pounds, but by part payments that sum was never actually due, it was held that the debt or cause of action was for less than five pounds. (*Pope v. Barnard*, 3 M. & W. 424.—See *Moreau v. Hicks*, 1 H. W. 87). As to a balance, see *Green v. Bolton* (4 Bingh. N. S. 308)."

The question, with all the recent decisions thereon, was so fully entered into and discussed in an article on the County Courts in our last Number, that it is unnecessary for us now to add to it anything more; but upon another point, which has of late been frequently mooted, viz. the landlord's right of priority in respect of rent over an execution creditor, it may be useful to make a remark. The question turns on the construction to be put on the 107th section of the Act. The following are the words of that section:—

"Be it enacted, that so much of an act passed in the eighth year of the reign of Queen Anne, intituled 'An Act for the better Security of Rents, and to prevent Frauds committed by Tenants,' as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any court holden under this act; but the landlord of any tenement in which any such goods shall be so taken shall be entitled, by any writing under his hand or under the hand of his agent, to be delivered to the bailiff or officer making the levy, which writing shall state the terms of holding, and the rent payable for the same, to claim any rent in arrear then due to him, not exceeding the rent of four weeks where the tenement is let by the week, and not exceeding the rent accruing due in two terms of payment, where the tenement is let for any other term less than a year, and not exceeding in any case the rent accruing due in one year; and in case of any such claim being so made, the bailiff or officer making the levy shall distrain as well for the amount of the rent so claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution issued under this act, and shall not proceed to sell the same or any part thereof within five days next after such distress taken; and if any replevin be made of the goods so taken, such of the goods shall be sold under the execution as shall satisfy the money and costs for which the warrant of execution issued, and the costs of the sale; and the overplus of such sale (if any), and also the residue of the goods, shall be returned as in other cases of distress for rent, and replevin thereof; and for every such additional distress for rent in arrear the high bailiff of the court shall be entitled to have as the costs of the distress, instead of the fees allowed by this

act for making such distress, and keeping possession thereof, the fees allowed by an act passed in the fifty-seventh year of the reign of King George the Third, intituled 'An Act to regulate the Costs of Distresses levied for Payment of small Rents.'

In *Barr v. Reid* (see "County Courts Chronicle," p. 41,) Mr. Moylan, the judge of the Westminster County Court, held that the statute of 8 Anne, c. 14, was not in substance repealed by the above section, but that the landlord still was entitled to precedence over the execution creditor. After remarking on "the old inviolability of the tenant's goods," Mr. Moylan says, "under the new law this precedence or superior right of the landlord is merely modified, and in cases of small tenancy still further restricted in amount. He must go through certain forms to assert his right. The *onus* of inquiry is no longer on the high bailiff as it was formerly on the sheriff; the principle of precedence remains quite untouched. If it were not so, why impose upon the landlord the trouble and expense of serving on the high bailiff any notice of his claim for rent? Could it be to secure to him what is already, and must continue to be his as long as the rights of property are respected? This would be tantamount to a declaration that the landlord's right to his rent is not to be altogether forfeited; on the contrary, this section is a clear and equitable one and as plainly expressed as the English language can express it." Mr. Moylan then refers to the 118th section, by which, in case of any claim by the landlord, power is given to the court to adjudicate thereon, and contends that such provision would be useless if a contrary construction were put upon the 107th section. Mr. Udall, in his edition of the act, is also of opinion that if the landlord claims for rent, he is to be paid before the execution creditor, and the same view is supported in an article in the "County Courts Chronicle." On the other hand, Mr. Francillon, in *Clissold v. Jefferies* (see "County Courts Chronicle," p. 63,) has holden that the landlord has not such priority, but that after claim of rent it is the duty of the bailiff to make a further levy or distress, and that the execution is to be satisfied out of the proceeds of the first and the rent out of those of the second. This decision has since been followed by one pronounced by Mr. Ingham, the judge of the County Court at Carlisle, in the case of *Duke of Devonshire v. M'Cutcheon* (see "County Courts Chronicle," p. 82,) and which equally determines that the landlord is not entitled to precedence. Also Mr. Collyer, the judge of the County Court at Biggleswade, is reported to have said, upon being referred to the case of *Clissold v. Jefferies*, "that he entirely agreed with Mr. Francillon in his construction of the Act." (See 10 Law Times, p. 25.)

The weight of judicial authority decidedly preponderates against the landlord's right to precedence. We incline to think that the decision of the majority is right. At common law the landlord had no such priority. The 8 Anne, c. 14, s. 1, gave him such right by obliging the execution creditor to pay him, before sale and removal, the rent, not exceeding one year's rent, which might be due. This was the only statute law by which the landlord was entitled to precedence prior to the County Courts Act. The 107th section begins by repealing this very statute of Anne as to goods taken in execution under process from the County Courts. The landlord is thereby placed, as to such goods, in the same situation as any other creditor; so that his claim to priority must rest solely on the County Courts Act having afterwards conferred this right on him. Is there then anything in the 107th section which confers it? Expressly it clearly does not; does it impliedly? Surely it would be strange to expect that the very section which begins by expressly taking away this right should afterwards impliedly concede it. We certainly see nothing that warrants such a construction, but think that there is much truth and reason in the following expressions which are reported to have fallen from Mr. Ingham: "The fact of a provision having been made in case of replevin, whereby it is expressly enacted that the execution creditor shall, notwithstanding such replevin, proceed to sell, I think shows distinctly that the legislature intended that the landlord should no longer have this priority. Nor can I see on what principle of equity or justice that priority should exist, or why the man who finds a shelter should be paid before the man who provides the daily bread."

Our space will not allow us to say more on this question nor to comment on the other points which have arisen. Mr. Moseley has treated on some and anticipated others, but cases have arisen and will necessarily occur which he could not possibly have contemplated when he was writing. The law and practice of these courts cannot be well understood until they have been for some time in operation. The practice cannot be created at once, nor can the law (though it be only the common law engrafted on the statute law) be quickly fashioned. Time must do the work. Out of the difficulties and questions which must continually arise whilst the courts are as it were feeling their way, both the law and the practice will grow. In the meantime it is very difficult to write a good and impossible to write a perfect treatise on the subject. As a foundation for the superstructure Mr. Moseley's work is entitled to praise and will be of considerable service.

ART. VI.—JOTTING BOOK OF A CHIEF JUSTICE.

THE note-book of an eminent man will generally be found worthy of perusal. Consisting of memoranda thrown together in brief intervals of a busy life, and written at the time when the various subjects were suggested to the mind, it often possesses a vigour and a condensation of thought which we do not meet with in more elaborated works. Although no stirring incidents may be recorded, yet many of the natural tastes, studies and pursuits of the writer will be faithfully reflected in its pages. It is interesting to have the man brought before us, divested of the pomp and dignity pertaining to his station, to see him in his home recalling the events of the day and endeavouring to give a permanent form to impressions of the fleeting hour.

We are about to present to our readers a miscellaneous note-book, written about a hundred years ago by Sir William Lee, Chief Justice of the Court of King's Bench in the reign of George the Second, and found among his books and papers at Totteridge Park, in Middlesex. The manuscript is entitled "Miscellanea," and dated 1739, which was the second year after his appointment as chief justice. It has been kindly placed at our disposal by Dr. Lee, of Hartwell, in whose noble library are numerous MSS. of Sir William Lee, testimonies alike to his learning and his industry.

The life of the writer was uneventful and affords few materials for a biographer, but it is pleasing to be able to say with truth that he was a good man, as well as a good judge. He appears to have been of an amiable disposition, and to have been much esteemed and beloved. Lords Hardwicke and Raymond were among his most intimate friends. He was the second son of Sir Thomas Lee, Baronet, of Hartwell, and was the brother of Sir George Lee, Judge of the Prerogative Court. He was born in the year 1688, was made a puisne judge of the Court of King's Bench in 1730, succeeded Lord Hardwicke as chief of that court in 1737, and on the death of Mr. Pelham was appointed Chancellor of the Exchequer. He married first Anne, daughter of — Goodwin, Esq. of Bury, in Suffolk: she died in 1729; his second wife was Margaret, daughter of Roger Drake, Esq. and widow of Mr. Melmoth, a merchant. Sir William Lee died in the year 1754.

The reports of Lord Chief Baron Comyns are dedicated to him, and several of his decisions were published in 1815 by Thomas Lee. His name will be frequently met with as counsel and as judge

in the State Trials, (vols. 16—18): in the latter capacity he took part in the trials of the Pretender's adherents. Sir James Burrows bears the following testimony to his virtues, and although it is cast in the *stereotyped* form of panegyric, yet we believe that in this instance it does not pass the boundaries of truth. "He was a gentleman of most unblemished and irreproachable character, both in public and in private life, amiable and gentle in his disposition, affable and courteous in his deportment, cheerful in his temper, though grave in his aspect; generous and polite in his manner of living, and deservedly happy in his friendships and family connections, and to the highest degree upright and impartial in the distribution of justice. He had been a judge in the Court of King's Bench almost twenty-four years, and for near seventeen of them had presided in it. In this station the integrity of his heart and the caution of his determinations were so eminent that they probably never will, perhaps never can, be exceeded."¹

MISCELLANEA, 1739.

Dugdale, Origines Juridicales, 38. 3 Inst.² Vide chapter, King's Bench. The first Capitalis Justiciarius ad placita coram rege tenenda was Robert de Bruis, made 8 March, 52nd H. 3d. The title of Justiciarius Angliæ having an end in Philip Basset, who was advanced to that place 45 H. 3d; vide Spelman's Glossary, verb. Justitiarius and the Catalogue of Chief Justices.

Q. If his manner of creation from letters-patent to *writ* was not to prevent any pretence of claiming the power of Justiciarius? 3rd Inst.³ chap. King's Bench. Lord Coke says, that it was by authority of parliament that the Chief Justice was directed to be by writ, for the appointing an officer in other manner than the law prescribes could not have been done without a statute. And it seems to me, that his creation was directed to be by a writ that so there might be a certain legal prescription for creating him, which was most likely to be kept to, when it was done by writ (which is a known form of law), whereas there is more latitude in framing letters patent, which are the Royal deed.

N.B. Lord C. J. Holt held this writ, by which Chief Justice

¹ Settlement Cases, p. 328, n. Sir James concludes by saying, "He was peculiarly master of the learning concerning the settlement of the poor"—a climax which, we think, more appropriate in a note than in the text.

² It should be 4th Institute.—Ed.

³ Should be 4th Inst.—Ed.

created, a writ patent, and wrote a large dissertation to prove it : *ex relatione* Lord Hardwick, C. J. ; *vide post*, an account of Holt's Dissertation.

N.B. It appears by *Chronica Series*,¹ that *Justiciarius Angliæ* had regimen Regni. But the Chief Justice now is only *ad placita coram Rege tenenda*.

N.B. It was matter of complaint against Lord Coke, that he styled himself *Justiciarius Angliæ* ; whereas, as King James the First said, he was C. J. only of the Court of King's Bench : and N.B. he was summoned before Council for indecent words spoke in King's Bench relating to Court of Chancery.

V. 43 Eliz. c. 2,² where he is called Chief Justice of England ; v. Hale's Hist. P. C. 1st vol. 706. The grant of a judicial office by the king *quam diu se bene gesserit*, though it be a freehold, determines by the king's death, for it is personal to the king, who grants it.

Holt, C. J., agrees with Lord Hale's opinion. But as touching acts of parliament regularly, the word king extends to his successors. Word king includes his successors. Lord Trevor thought judges' patents did not determine by death of the king. Holt, *contra*.³

V. Vaughan's Rep. Patent of king, which is good in creation, will not be void by his death. Mem. Though it is true that grants of judicial or ministerial offices, *durante bene placito*, are simply determined by the king's death, 12 Co. 48 : yet grants of offices of another nature, or grants of lands *durante bene placito nostro*, do not determine by the death of the king, without some act or declaration by the successor to determine them. 12 Co. 49.

Q. If king grants a judicial office *quam diu* grantee *se bene gesserit*, for himself and his successors, how it operates ?

The first *Capitalis Justiciarius* in C. B. was Gilbert de Preston, made the 1st Ed. 1st.⁴ The first Chief Baron in Dugdale's *Chronica Series*, fol. 32, was William Carleton, 31 Ed. 1st.

N.B. The first Speaker on record is Sir Thomas Hungerford, 50th Ed. 3d. The first Speaker that disabled himself by speech is Sir R. Walgrave, 5th Rich. 2d.

Vid. Willis' MSS. Queen Elizabeth's answer to a disabling Speaker, viz. that every man was obliged to take the burden of an office to which he was elected.

Seymour was the first Speaker not bred to the law. 1st Burnet, 382.

¹ By Dugdale.—Ed.

² S. 14.—Ed.

³ P. 332. *Thomas v. Sorrell*.—Ed.

⁴ Orig. Jurid. c. 18.—Ed.

N.B. Secundum Gurdon, fol. 249 :¹ Lords and Commons divided about the 20th Ed. 1st, and sate together before that time in the same room. Vid. his account of British and Saxon Councils before the Conquest. And by that author, it is probable that they had at first only a Chairman, elected pro hac vice, and no settled Speaker.

Vide stat. 1 Will. 3d, Sess. 1st, c. 21, about the Commissioners of the Great Seale, whereby the place of the Speaker is before the Chief Justice of the King's Bench and is next after the Peers and before Commissioners, not Peers.

Vide List of Speakers from the beginning to 16 Car. 2d, in a treatise entitled Hakewell's *Modus tenendi Parliamentum*.

Dugdale 32 and Selden : the office of Lord Chancellor is as ancient as Ethelbert, (the first Christian King of the Saxons.) Lambard's *Archion*, fol. 36.² By statute 28th H. 3d it was enacted that the keeper of the great seale should be allways the Chancellor, but that was not observed, which occasioned the stat. 5th Eliz. c. 18.

The first jurisdiction of the Chancellor in hearing causes did not begin till Edw. 1st time, when the Courts were divided : nor are there found any bills in Chancery till 20th H. 6th. Et vide my manuscripts (Willis), a speech regno Eliz. by Lord Chancellor, in which he advises the Serjeants to counsell the clients to proceed at common law, unless their case be of that sort that remedy cannot be had but in Equity.

N.B. Brown Willis, Esq. did inform me that Bishops had no fixed Registry till the reign of King John ; and that there were few regular lists of Members of Parliament now to be found, but he did in writing his *Notitia Parliamentaria* gain some light from entrys in the books of the Borough Taxes found in *Cistis Burgi*.

N.B. Table of degrees for Marriage was first sett up in churches tempore A. Bishop Parker, anno 1683. Vaughan's Reports : Harrison's Case.

Vide Mes MSS. Brown Willis, where there are several speeches made by Lord Chancellors regno Eliz. to Lord Mayors on presenting them to the Queen, and the contents thereof are directing him in his duty and threatening him with the pursuit of the law, if he did not follow it.

Vide Malebranche Recherche : Of the great use of the study of Geometry to fix the mind ; Arithmetic and Algebra to enlarge it.

¹ History of Parliament, 2 vols. Lond. 1731.—ED.

² See fol. 55.—ED.

Nov. 21st 1731: Memorand. Mr. Bedford, a clergyman, who lately printed a large book to fix the chronology of Scripture, did declare that Mr. Whiston was 1200 years too early in his chronology and Sir Isaac Newton was 1200 years too late.

Vide Anderson's Reports; ¹ Cavendishe's case. Judge's Answers to Queen Elizabeth's letters; and vide the Record of Indictment against Empson and Dudley.

N.B. St. Edmund's Bury did not send Members to Parliament till Jac. 1st, and they are enabled thereto by charter, ut dixit Lord C. Baron Reynolds, Nov. 27, 1731, at my house. Abbey of Bury was of Benedictine Monks, ex Reynolds C.B.

Et N.B. Arthur Onslow, Esq. Speaker of House of Commons did affirm that it had been resolved in Parliament in a case where that point was particularly considered, that where power of electing Burgesses was by Charter, such right of Election was good. Vide Lord Bacon's opinion ad idem.

Q. Whether the feudal law was received before the Conquest? Speaker Mr. Onslow seemed to think it was (which is Selden's opinion); Lord C. B. Reynolds thought not, vide Gurdon. It seems to have been received in part.

N.B. William the Conqueror had an income of near three millions per annum, ut dixit A. Onslow, Speaker.

N.B. The MSS. in Cotton Library were 900, of which 640 now remain untouched by the fire; 130 are damaged, but recoverable, the rest it is feared are destroyed.

Per Lord C. B. Reynolds. Spelman's account of Tenures in his Remains is the best account thereof; Nicholson's Library, 236,² of same opinion.

Per Baron Comyns. There are many faults in Wood's *Athenæ Oxonienses*.

N.B. Per Serjeant Baynes. There is an originall MS., which belongs to Duke of Montague, called the Originall of the Jurisdiction in Chancery. Per Speaker Onslow: The 2nd book of the Judicature of Chancery, printed by Sir Joseph Jekyl, Master of the Rolls, is an excellent Treatise, and by comparing it with Sir Joseph's Reply in Dr. Sacheverell's tryall it seems to be the same piece with that quoad language, from whence it may be inferred that the book was wrote by the Master.

N.B. The printed Statutes, which are a translation of the old Statutes in French, doe vary very much from the Statutes on the

¹ Pp. 152, 156.—Ed.

² Bishop Nicholson's *English, Scotch and Irish Historical Libraries*.—Ed.

Statute Roll; ut agnitum fuit per Lord Raymond, Lord C. Baron Reynolds, Baron Comyns and the Speaker Onslow. And the Statute Roll does often vary from the *Parliament Roll*, which was thought to be by the alteration made by the Judges. Particularly in the stat. about Pleadings being in Latin. Anciently there was not a Preamble to every Statute; v. Bacon of Uses.

N.B. Lord C. Baron Reynolds did declare Nov. 27, 1731, that Lord Somers' argument in the Bankers' case was the finest thing he had seen; it is in the hands of Sir Joseph Jekyl, and the Speaker said he had been informed by Sir Joseph Jekyl that Lord C. J. Holt did declare in the House of Lords that he thought Lord Somers was right, and that he was mistaken, but Powell J. said to him, My Lord, what will you give us all up? which prevented Holt, C. J. declaring in the House of Lords that he was convinced by Lord Somers.

N.B. This argument was printed anno 1732, and I have it given me by Sir Joseph Jekyl.

Gurdon's 1st vol. 35. The secular laws were made in the vernacular language; ecclesiastical laws were in Latin, clergy who were learned being chiefly concerned in them.

Per Gurdon, fol. 38. The terms Witenagemote and Michel-Synod began to be layed aside in the reign of Edw. the Confessor, and instead thereof they used the word Parliament in the French dialect: he having the greatest part of his education in France.

Gurdon, 17, who cites Bodin De Repub. The old Britons were carefull to prevent seditious reflections on the administration, their law allowing none but the Magistrates to talk of affairs of the Commonwealth, and that only in open Council.

It appears per Gurdon, 148, and in this he is supported by 2d Inst. 227, that rumours or libells tending to raise discontent were punishable at Common Law, viz. by Saxon Stats., as also by Stat. Westm. 1st, c. 34; 2nd Rich. 2, 5; and 12 Rich. 2, c. 11.

Vide Gordon's Tacitus: Roman Law de Majestate, which punished libells.

Vide Gurdon, fol. 85, whereby it appears that there was a Magnum Consilium, besides the *Parliament*, which Magnum Consilium consisted in Edw. 1st, 2nd, and 3rd's reign, of bishops, abbots, priors, five earls and eleven barons, but no Commons. The summons to Magnum Consilium was by Privy Seale, to Parliament by Great Seale. Q. If this Magnum Consilium be not what Mr. Onslow, Speaker, calls Consilium Ex-

traordinarium? Q. Is Cabinet Council known in the law?—Hale's Analysis, 7, 8.

Per Coke, 1st Inst. 110. The king has four councils; (i. e.) Commune Consilium, the Parliament, *Magnum Consilium*, his great men: 3d, Privy Council; 4th, *Legale Consilium*; viz., his judges in law matters; and by that author, when mention is made of councils, it is to be understood secundum subjectam materiam. Q. If deeds or charters by king, with barons, &c. witnesses, were not in the *Magnum Consilium*? Q. If equity jurisdiction did not arise from this *Magnum Consilium*, which is the opinion of Mr. Onslow, Speaker.—Vide Hale's History of the Crown Laws, 421.

N.B. Mr. Brown Willis says that there were councils of trade. N.B. He says to be created a borough was anciently thought a great privilege, and the borough men were excused from attending county courts, &c.

N.B. Mr. Onslow, Speaker, did inform me that it had been determined that a clergyman may not sit in the House of Commons.—Vid. Chamberlayne's State of Great Britain, ad idem, chap. Parliament. V. Abridgment of Stats. tit. Parliament, ad idem, 4 Inst. 47. Nor can judges sit in the House of Commons.

By Norris. The appetites of the soul are compared to motions in bodys, which allways gravitate, till they attain their centre. The soul has desires, which run on indefinitely to all possible good; and therefore cannot be satisfied with any created good.

December the 5th. Baron Comyns did declare at Lord Chief Baron Reynolds', that Sir John Bramstone told him that Sir H. Grimstone gave 8000*l.* to Lord Clarendon, when he was made Master of the Rolls, and Lord Chief Baron Reynolds did declare that Parker, who was his relation, did refuse to give Lord Clarendon 3000*l.*, which was insisted by him to be an usual perquisite to the Great Seal on making a judge.

N.B. Styles' Reports are dedicated to Parker.

N.B. It appears by Rapin that Lord Southampton, who was Lord Treasurer to Car. 2nd, and Lord Clarendon, who was Chancellor, were his best ministers. It appears also by the letters of D'Estrade that Lord Clarendon advised the sale of Dunkirk, and that Lord Clarendon was also extremely averse to the Presbyterians, who by that history appear to have behaved very well, and to have been for the Restoration.

N.B. James 1st, Car. 1st, Car. 2nd, and James 2nd, attempted to make themselves absolute. The Cabal in Car. 2nd's

time consisting of Clifford, Arlington, Buckingham, Ashly Cooper, and Lauderdale, were in measures to make the king absolute; but Lord Shaftsbury, finding himself not supported by the king, turned against him, and was a great stickler for the country party. His interest lay in the city of London; but the king getting the city towards the end of his reign, (viz.) after the Oxford Parliament, which is King Charles the 2nd's last Parliament, Lord Shaftsbury fled and dyed in Holland.

N.B. Lord Danby came in against the Cabal; but being accused by Montague of advising the king in the affair of the king being a pensioner to France, he was impeached by the Commons, though from the opposition given to this impeachment by the King and House of Peers, no effect was of this impeachment; and after a dissolution of Parliament, he was bailed out of the Tower by King's Bench.

N.B. The Statute of Uniformity was levelled against the Presbyterians, as also the Corporation Acts, and the Uniformity Act was contrary to the king's declaration at *Breda*.—Rapin, 13th vol. 291.

Vide Rapin's Dissertation on the Origine of the English Government, at the end of his 14th volume, where there is a very pretty account of our partys of Whig and Tory; and N.B. The policy of the crown seems to be, not to attempt absolute power in itself, but to intrigue with the Parliament. This was done by H. 8th and Queen Elizabeth.—Rapin, 14th vol. 420. Policy of King William's reign was to give encouragement to both partys; fearfull to favor the Whiggs too much, for fear it should be thought he would establish Presbyterianism; fearfull also to encourage the Torys too much, for fear the high-flying party might give strength to the Pretender: at first his ministers were of both partys, and afterwards he changed his ministers often.

Queen Anne, who was weak and self-willed, first joyned moderate Torys; viz., Lord Godolphin and Lord Marlborough, with Whigs, and things went well; afterwards, when she used Torys only, they would have brought in the Pretender.

Q. If it would be right to repeal the occasional bill? The present plan seems to be to keep things quiet, without meddling with Church matters; and doubtless the Church party, as moderate Torys, are the superior interest of the kingdom.

N.B. The occasional bill was repealed tempore Geo. 1st, in Lord Stanhope's ministry.

Vide Rapin's Remarks on our present Parliamentary Constitution, fol. 458.

Rapin, in his *Origine of Government*, seems to think that William the 1st was an absolute conqueror; but the barons growing strong afterwards, and his successors, William Rufus and Henry 1st having disputable titles, they then, to secure the possessions they had got, claimed their Anglo-Saxon liberty, and insisted on the Magna Charta, which they obtained from King John, had confirmed by H. 3d, and after confirmed to them by Edw. 3rd; and N.B. It does appear that Edw. 3rd never made any attempt on the libertys of the people.

Gordon's observations in his discourses before Tacitus, 1st vol. Englished.

Fol. 2. French tongue is noted for faintness and circumlocution.

Mem. Dryden was a fine writer, had a *copious imagination*, a good ear and a flowing style. He was a man of parts, and a master of language.

Vid. his character of Tacitus, which is good; and N.B. He says Lucretius was the noblest wit of all the Latin poets.

Tacitus' description of the times of Nerva and Trajan: *rara temporum felicitate, ubi sentire quæ velis, et quæ sentias dicere licet.*

Fol. 16. Mr. Locke is too wordy. Tillotson's style is fine, but takes up too much room. It is probable he chose it as fit for popular discourses, for his parts show he could have been more sententious: the language of the worthy Lord Clarendon is weighty and grave, but encumbered, darkened, and flattened by multiplication of words.

The style of Livy flowed like the prosperity of the state; Tacitus wrote when the times were bad and dark; but the ancients never complained that he was obscure.

Owen's epigram is a fine short character of Tacitus:—

“*Veracem fecit Probitas; Natura Sagacem:
Obscurum Brevitas te: Gravitasque Brevem.*”

Fol. 23. Apology for Tacitus' treatment of the Christians and the Jews, and shown that the Christians were of a tyrannizing spirit.

Fol. 31. Good style began tempore Elizabeth; and was seen in Sir W. Rawleigh.

Productions tempore Jac. 1st are wretched, and Sir J. Bacon was infected.

Several fine writings between Car. 1st and the Restoration: Chillingworth's style is free as his own candid spirit. Same character of Lord Falkland, and Mr. Hales of Eaton. Mr.

Hobbes' style beautifull beyond example. Milton's prose is harsh and uncouth, though vigorous and expressive. Selden and Hammond are rugged and perplexed. Dr. Burnet, of the Charter-house, wrote with great eloquence and majesty, yet easy and unaffected (per me: Q. If spirit was not what Horace advises, viz. recidere ambitiosa ornamenta?) Lord Shaftesbury had a soft alluring style; the style of Sprat, Bishop of Rochester, is full of affectation; he aims at harmony and wit, but succeeds ill, for his manner is pedantick and starched: Atterbury is more to be admired.

(Vid. Dryden's Preface to 1st vol. of Miscellanys concerning the English language.)

Fol. 33. The English language is naturally cold, and the less force our words have the more they must be multiplyed, but this multiplyng words is tedious, and the remedy as bad as the disease. The Latin phrases are short and lively, and few words convey many images.

Per Lord C. B. Rapin has shown Bacon's Henry 7th was a meer romance. He commends Herbert's H. 8th, and has shown Camden's Elizabeth to be a scandalous piece.

The Old Testament contains the Penteteuch, viz. the 5 Books of Moses:

Genesis, Exodus (Delivery from Egypt), Leviticus, relating chiefly to the Levites, Numbers, from numbering the people, and Deuteronomy, the second delivery of the law, and explanation of the law delivered from Mount Sinai.

Joshua to succeed Moses.

Judges, persons particularly raised by God to govern Israel.

Ruth, a particular person.

1 & 2 Samuel, an account to Saul, and from him to David.

1, 2 Kings; 1, 2 Chronicles, an abridgment and recapitulation of the Kings: Job; Psalms, chiefly by David; Proverbs; Ecclesiastes; Song of Solomon.

Vide the reply to an answer to a letter wrote to Dr. Waterland. N.B. The answer was wrote by Dr. Pierce.

Vide Stillingfleet's *Origines Sacræ*, an account of these books of the Old Testament.

The residue: Books of Prophets or particular persons, viz. Ezra, Nehemiah, Esther, Isaiah, Jeremiah, Lamentations, Ezekiel, Daniel, Hosea, Joel, Amos, Obadiah, Jonah, Micah, Nahum, Habbakuk, Zephaniah, Haggai, Zechariah, Malachi.

Co. Litt. 7: v. British Compendium, 1st vol. an account of the arms of England. Seals were used by our kings very anciently, viz. anno Dom. 956, but it was the king sitting in a

chair on one side, and sitting on horseback on the other. The first seal of arms was used by Richard 1st, who sealed with lyons, for the Conqueror of England bore 2 lyons. King John in right of Aquitaine, not Normandy, as said by Lord Coke, which dukedome of Aquitaine came from his mother, added a 3rd lyon. Edward the 3rd, 13th of his reign, quartered the arms of France by title from his mother.

Defensor Fidei assumed 13th H. 8th; supreme head, 20th H. 8th; Lord of Ireland till 33 H. 8th, when first called King of Ireland.

Vide Rapin's History, an account of obtaining Uniformity Act, which was with design to oppress the Presbyterians, force them to pray for toleration, whereby it was hoped Popery might be introduced.

V. D'Ewes' Journall, an account of the Uniformity Act in Elizabeth's reign.

Rapin, 11th vol. 86. Reasons for abolishing bishop's right to be in parliament or other civil employment, and taking away deans, chapters, &c., and reforming Ecclesiastick Courts.

2nd vol. Gordon's Tacitus, 101. Denmark became absolute by the oppressions of the nobility; and the people for revenge made the king absolute, to make the nobility slaves.

Vid. fol. 145. An honest and disinterested heart, which is a constitutional virtue, is a never failing test to distinguish a publick spirited man:

Greatness without dignity, which arises from publick benevolence, as well as capacity, is like laws without penaltys; the weak and simple may perhaps submit to them, but they are despised by those whom they are most wanted to restrayn:

Greatness acquired by great abilities and public spirit will be enjoyed with satisfaction, though it cannot allways escape obloquy and clamour:

Grandeur, in order to be supported by the publick, must be supported by merit towards the publick:

Societys can never be supported but by the same means by which they were first instituted, impartiality and justice, which are national securitys.

By Thucidides, Bad laws well executed are better than good laws not duly observed.

Per Gordon, 2nd vol. Tacitus. The magistrate should allways be at the head of religion in his country, or the teachers will govern.

By Rapin, 12th vol.: Episcopacy is received in no Protestant

country but England, and not by all there; King Charles 1st cannot be called a martyr for *religion*, for though a friend to Episcopacy, would in great measure have given it up at Newport Conference: N.B. Charles 1st scheme was for absolute power. He was insincere, and ruled by Buckingham, Strafford, Laud, and the Queen, which last was a Papist. Charles was destroyed to make way for a Commonwealth.

Gordon's 2nd vol. Tully's Epistles are a fine secret history of the times.

Locke—The way of enlarging knowledge is to get clear ideas and to find intermediate ideas which may show the agreement or repugnancy of other ideas: The method of our inquiry should be adapted to the nature of the ideas we examine. General truths are founded in the relations of abstract ideas. Inquiry concerning substances must be by tryalls. Morality is the proper science of mankind.

Locke's division of the sciences is into Naturall Philosophy, in which he includes what is called Metaphysicks, into Ethicks, and into the Knowledge of Signs, i. e. of Language.

There are three degrees of knowledge, viz. Intuitive; Demonstrative; Sensitive, i. e. of the reality of things, which appear in the mind by entering at the senses.

Locke's 1st Book refutes the common opinion of innate ideas, wherein it is plainly shown they are unnecessary.

2nd Book treats of ideas in generall.

3rd Book treats of language and words in generall.

4th Book treats of knowledge.

Vide Cumberland's Law of Nature, 149: .

It is providentially contrived that the memory of children should be retentive, whereby we become fit for business. We retain much concerning God and man, the causes of the common good, and that happiness we hope for.*

Burleigh's Precepts to his Son:

(N. B. Burleigh was Secretary of State to Edward 6th; Lord Treasurer to Q. Elizabeth; Walsingham was Secretary.)

To keep some great man his friend: to compliment him often with many, but small gifts, and if he has cause to bestow any great gratuity, lett it be something allways in sight:

Towards superiors be humble and generous; with equals familiar, yet respective; towards inferiors show much humanity and some familiarity:

The first prospers thy way to advancement; the 2nd makes thee known for a well-bred man; the 3rd gains a good report, which once got is easily kept:

Not affect, nor neglect popularity too much : seek not to be Essex ; shun to be Rawleigh.

Trust no man with thy life, credit, or estate.

Be not scurrilous in conversation, nor satirical in jests.

Advice to keep an orderly table.

Suffer not thy sonnes to pass the Alpes, for they learn nothing there but pride, blasphemy and atheism ; neither train them in warres ; such are hardly honest or good Christians, and it is a science no longer in request, than in use.

As to servants keep rather two too few, than one too many.

N. B. He was much for peace in England ; was against war with Spain : (Essex was for a war ;) had many enemys, was religious.

N. B. In Queen Elizabeth's reign education was at the Inns of Court : Rawleigh bred there.

Appendix to Cumberland, 70.—Of all beautys-the most engaging is that which is drawn from real life, viz. : the beauty of sentiments ; the grace of actions ; the turn of character, and the features of a human mind.

The beauty of poetry is in vocal measures, or syllables and sounds, to express the harmony and numbers of an inward mind, and by proper foils and contrariety to render the musick of the passions more enchanting.

July 2nd, 1732.—At a meeting of Lord Raymond, Lord C. J. Eyre, Lord C. Baron Reynolds, Master of the Rolls, and Brother Cummysns, Sir P. Yorke, Attorney-General, who had had the inspection of them, informed us that the first commission for settling fees was 35th Eliz. ; many others in King Jac. 1st and King Chas. 1st ; and that the first enquiry directed was Courts Ecclesiastick, but no returns appeared to any of these Commissions.

At this meeting Lord C. J. Eyre declared he knew no law for tying the thumbs of prisoners with whip-cord, to which the rest seemed to assent, and Brother Cummysns declared he never found any mention of it in any book but Keelyng, and Lord C. B. Reynolds declared, that he thought when judgment of peine fort et dure was past, that it was irrevocable. Sed N. B. The practice is otherwise, and it was agreed that J. Tracy had tyed a man's thumbs, who stood mute. To this opinion of Lord C. B. nothing was said by the rest of the company. And N. B. Lord C. Baron said that there was a case before Lord C. Baron Gilbert, where a man stood mute, and he impanelled jury to enquire if he stood mute of malice. V. Lord

C. J. Holt's opinion in Salkeld's Reports, that judgment of *peine fort*, &c. is revocable at the same sessions.

12th October, 1732:

At Sir Joseph Jekyl's, Master of the Rolls; present, himself, Judge Cummysns and a clergyman; a dispute arose whether the will of God was the proper obligation to morality, or the consideration of the reason of things. The clergyman maintained the will of God to be the only obligation; the Master and Brother Cummysns held the reason of things to be the obligation.

Vid. Cudworth's System; vid. Conybear; vid. King's Inquiry of Evil. The reason of things directs God in willing:—Per me, Quære then, if that will of God be not the obligation on man?

N. B. Lord C. Baron Reynolds, summer assizes, 1732, seemed to think the will of God was the true obligation on man, and the reason of things not sufficient as an *obligation*.

N. B. It seemed agreed by all at the Master of the Rolls, that this dispute turned much on the true sense of the word (*obligation*). Mr. Conybear states the whole case well.

N. B. Lord Shaftesbury proves the reason of things to be the obligation, by showing that acting agreeable thereto will give happiness to any reasonable being, and acting contrary thereto will be certain misery.

To end this dispute, I think it is our business to find out the reason of things, and when we have found that, and act according to it, we may be sure we obey the will of God.

12th October, 1732.—The Master of the Rolls, Sir J. Jekyl, took this objection, which he said he had heard made to Mr. Woolaston's Religion of Nature Delineated, viz.: he states morality to consist in conformity to truth, and immorality in contradiction to truth, and the degrees of immorality in the number of truths contradicted; but his mistake is, in regarding only the number of truths, but not taking notice of the importance of the truths contradicted. Q. If this be so in the author mentioned?

The current coin of Great Britain is about twelve millions.

The annual value of the rent from lands about eighteen millions.

The funds chargeable to India Company are three millions.

South Sea Company's Stock, fifteen millions;—Debt in Bonds, one million. Three millions the product of the forfeitures; half a million has been paid in dividends, the rest lost in trade.

N. B. This account of pressing I extracted from a book lent to me by Arthur Onslow, Esq., Speaker of the House of Com-

mons, anno 1733, and the same was wrote, as he told me, by Mr. Carbett, an officer in the admiralty, and now a member of Parliament for Saltash in Cornwall. (Vid. Hist. Plac. Coronæ 678, where it seems Hale, C. J., thought pressing not justifiable. N. B. Prest money is imprest money, i. e. earnest of the contract.)

In Saxon times, if any man upon summons by the horn did not goe to the war, he forfeited his life. Per stat. 11th H. 7th, c. 18, every subject by his allegiance is bound to serve and assist his prince, when need shall require.

Judges against ship-money seemed to allow the king's right to press ships and mariners, provided they were taken into his pay. It is a weak opinion that pressing seamen is against Magna Charta, for the passage applyed to that purpose, relates only to civil liberty to free persons from unjust imprisonment, but not to exempt a man from the necessary service of his country.

Not better grounded is the objection that the king cannot compel seamen to goe out of the realm, for the ships of the royal navy are esteemed the fortresses and outworks of the kingdom, wherever stationed, and are always within the jurisdiction of the Admiralty.¹

As therefore there is no inherent right in the people to be free from an obligation to serve, the next question is, in whom the power of forcing them to serve is.

Cited 13, 14 Car 2, c. 3, s. 1, that the command of all forces by sea and land is in the king, and the prerogative is most strong in respect of the sea service. On this principle, though other subsidys were granted only from time to time, the subsidy of tonnage and poundage, and other duties on merchandize, were granted for life, 37th year of H. 6th.

* The administration of justice in matters done at sea is under a distinct polity, and different from the proceedings in courts at law. Juries in admiralty courts present crimes according to the laws of the sea:² the mariners may joyn in a suit for wages; the ship is liable; the depositions of the absent

¹ See *Forbes v. Cochrane*, 2 B. & C. 464.—Ed.

² On the margin in this place is written, "Q. Which are the best books touching Admiralty proceedings?"

³ On margin are the following remarks:—"Vid. Preface to *Molloy de Jure Maritimo*: Laws of Admiralty are 1st of Rhodes, incorporated into civill law: of Oleron, an isle in the bay of Aquitayn, collected by Rich. 1st: Constitutions at Queenborough by Ed. 3rd, v. Zouch's Jurisdiction of Admiralty, his *Descriptio Juris Maritimi*, and Dr. Godolphin's View of the Admirall Jurisdiction, and the Practice of the Admiralty, by Clark; v. etiam *Consuetudo et Lex Mercatoria* and *Exton's Admiralty Jurisdiction*."

are allowed as evidence; the laws of Oleron as settled by Richard 1st, as other ordinances established by King John, Edw. 1st and 3rd, and other princes, sans concurrence of parliament, have the force of laws in the Admiralty Court. The orders for government of the navy, which were made an Act of Parliament, 13 Car. 2nd, were long before in use, and were originally appointed by the crown, or persons authorized by the crown; nor is there anything in the petition of right against this, and now, though the martial law at land is settled only from year to year, that of the sea is perpetually and binding on all parts of the world where the king's ships goe.

Authoritys to prove the right of pressing taken from an ancient MS. supposed to be wrote in time of Edw. 3rd, called the Black Book of the Admiralty, wherein are ordinances published by Rich. 1st, John, Edw. 1st and Edw. 3rd for ordering sea affairs, and there is reason to believe many of these regulations were long before the times of those princes, but digested by them into one body.

Vide No. 1, Art. 2; vide the famous inquisition at Queenborough, 49 Edw. 3rd, before Lord Latimer, Lord Warden of the Cinque Ports, and Wm. De Nevell, Admiral.

Conformable to these rules, practice has been to grant press warrants, as appears by Rymer's *Fœdera*. And the precedents produced are no part of the services performed by the Cinque Ports or other sea towns by virtue of particular customs, but such services as our kings have required by their right of sovereignty.

Tome 1, p. 180; do. 358; tome 3, p. 429; tome 4, pp. 225, 527, 716; tome 5, pp. 233, 378, 811, 815; tome 6, pp. 169, 708, 715; tome 7, pp. 195, 373, 501, 507; tome 8, 700, 730; tome 9, 107, tome 10, 417; tome 11, 843, 850; tome 12, p. 4; tome 16, 22; tome 17, 245.

N. B. Mr. Rymer's collections were done no lower than the 4th Car. 1st.

N. B. Though the kings of the realm before the reign of Hen. 8th, having no navy of their own, nor any established sea force, but what was furnished by the Cinque Ports and some other towns by reason of tenure, used when occasion required to press ships as well as mariners, yet when Hen. 8th formed a royal navy, pressing ships was less frequent; but there doe not want instances of that practice since the Revolution.

N. B. This power of the crown is vested in the lord admirall. Vid. 2 Gul. & M. c. 2, touching commissioners of the admiralty.

And N. B. The commissioners have no express authority from the king to press.

Lastly, cited passages, where parliament acknowledges the king's right to press ships and seamen. Rot. Parl. 45 Edw. 3, n. 32; 47 Edw. 3, n. 28; Rot. Parl. 2 Rich. 2, p. 1, n. 67; 2 Rich. 2, p. 2, n. 30; stat. 15 Rich. 2, c. 3; 2, 3 Phil. M. c. 11, s. 8; 5 Eliz. ss. 41, 43; 6 & 7 Will. c. 18, s. 19; 7 Will. c. 21, s. 15; 1 Annæ, c. 16, s. 2; 6 Annæ, c. 31, c. 37; 9 Annæ, c. 26, s. 1.¹

Concludes that there is the strongest proof of this power of pressing in the crown from authorities founded on the principles of the common law, and virtually confirmed by several statutes.²

Chamberlayn's State of Great Britayn, fol. 30. (N. B. Fleetwood, in his Cronicon Pretiosum, calls Chamberlayn an excellent author).

The English tongue is a mixture chiefly of the old Saxon and the old Norman, which was part French, part Danish, with a large mixture of the British and Roman languages.

The names of shires, cities, towns, and villages, places, and men in England are generally Saxon, and so are most nouns appellative, and a great part of the verbs.

Mem. v. character of English, the long-lived. Anno 1671, Henry Jenkyns of Yorkshire dyed aged 168 years. Anno 1635, Parr dyed, aged 152.

Nov. 11, 1734. Lord Hardwick, C. J. showed at Sir Joseph Jekyl's, Master of the Rolls, a small book, wherein was a collection of proclamations in Edw. 6th's time, printed by Grafton, the then king's printer, and among them a proclamation condemning all to the *gallies* who should spread false rumours; and N. B. This proclamation is not to be found in Rymer's "*Fœdera*."

Mr. Onslow, the speaker, declared, 1st November, 1736, that he thought giving money was not originally an act for the legislature; but the commons gave the money as the clergy gave money, and that the reason of its being made a legislative act was to levy it by force. Vide Madox Baronia Anglica, commended by Onslow; vid. Tyrrell's History, said by Onslow to be the best history extant of parliamentary constitutions. N. B. It appears by Wright's book, that escuage, which was money for military services, was granted per commune consilium.

We propose to continue, and probably to conclude, this Note Book in our next number.

¹ On margin:—"Vid. Stats. 2 Annæ, c. 19; 3 & 4 Annæ, c. 11; 4 Annæ, c. 10; 5 Annæ, c. 15; 6 Annæ, c. 10. Temporary Acts to authorize pressing mariners."

² On margin—"Emlyn thinks it clear that pressing is unlawful."

ART. VII.—THE ASSIGNMENT OF REVERSIONARY INTERESTS.

THE effect of an assignment by the husband of his wife's choses in action upon her right by survivorship is a point which, at one time, attracted considerable attention and provoked warm discussion in courts of equity. It was, at an early period, settled that, if the choses in action were of such a nature as to admit of their immediate reduction into possession, the wife might, by such assignment, be deprived of her right. The choses in action of the wife, in the event of their having been actually reduced into possession by the husband, were held to belong to him; and, further, as, upon a well-known principle of equity, whatever a party agrees to do is considered as having been actually done, an assignment of a chose in action belonging to the wife by the husband, who was in a position to reduce the property into possession, was regarded as a virtual agreement that such a step would be really taken by him, and was consequently held to be a reduction into possession.¹ Efforts, not less rash than vigorous, were made to extend that principle to reversionary interests. The doctrine, however, appears never to have rested on any more solid foundation than vague analogies and incidental dicta. The decision in one of the early cases was subsequently, on all hands, admitted not to be law;²

¹ As to the acts which constitute a reduction into possession by the husband of his wife's choses in action, it may be, once for all, remarked, that an actual payment or transfer to the husband, or to his account, is a reduction into possession (*Glaister v. Hewer*, 8 Ves. 195; *Ryland v. Smith*, 1 Myln. & Craig, 53; *Re Jenkins*, 5 Russ. 183); and that it is so, although it should have been made during the life of a prior tenant for life (*Doswell v. Earle*, 12 Ves. 473). Possession by husband, as executor or trustee, is not a reduction into possession of his wife's share of residue so as to give him a title against her right by survivorship (*Baker v. Hall*, 12 Ves. 497, 501; *Wall v. Tomlinson*, 6 Ves. 413). Receipt by husband of interest is not a reduction into possession (*Hore v. Woulfe*, 2 Ball & Beat. 424; *Nash v. do.*, 2 Madd. 133; *Horwood v. Fisher*, 1 You. & Col. 110). A suit in equity for a legacy, even after a decree for an account, is not a reduction into possession, according to the case of *Adams v. Lavender*, 4 Cl. & You. 41. But compare *Forbes v. Phipps*, 1 Eden, 502; *Nanney v. Martin*, Ch. Ca. 127; and Eden's notes to the case of *Hargate v. Annesley*, 3 Bro. C. C. 361.

² *Atkins v. Dewberry*, 1 Salk. 327; *Gilb. Eq. R.* 88. In the case of *Gage v. Acton*, 1 Salk. 327; 1 Raym. 515, there is reported an *obiter dictum* of Lord Holt, to the effect that a release by the husband of a reversionary interest of the wife bars her right by survivorship. This alleged opinion of Lord Holt, however, did not receive the sanction of the other judges. But although a husband may release, at law, a possibility of the wife, it by no means follows that he can

and in another,¹ more recently decided, the arrangement, which the order of court permitted to be carried into execution, was entered into for the accommodation of both parties.

The two cases, which have been usually quoted as betraying very clearly the leaning of Lord Hardwicke's mind upon this point, are those of *Bates v. Dandy*,² and of *Grey v. Kentish*.³ In the former, while the contingency, of the husband dying in the lifetime of the wife, was distinctly before his mind, he admitted that the husband might assign a possibility to which his wife happened to be entitled, provided such assignment were not voluntary, but for valuable consideration; and from the expressions there employed, whether essential or not to the decision of the case before him, it has been, not without reason, argued that, supposing Lord Hardwicke to have had reversionary interests in view when he alluded to "possibilities," he must have considered the assignment of such reversionary interests to be, in every event, valid:—whether the husband happened to survive his wife, the interest continuing reversionary until after her decease; or whether the wife survived the husband, and the interest which, at the time of the assignment, was reversionary, had become, in the lifetime of the husband, an actual interest in the nature of a chose in action. In the latter case, a husband had assigned a contingent and reversionary interest of the wife in a legacy as a security for repayment of a sum of money received by him. He became bankrupt; and died subsequently to the decease of the person entitled for life: so that, in this respect, the case was special, inasmuch as the assignment was not absolute, but only in the nature of a security, and destined to return into the hands of the husband's assignees. Lord Hardwicke seems never to have entertained a doubt concerning the fact that the wife had, at the period of the bankruptcy, an

assign it in equity. In questions of this nature there is no analogy between a release and an assignment. Vide the language of Sir Thomas Plumer, in the case of *Purdew v. Jackson*, 1 Russ. Ch. R. 49, 50.

¹ *Howard v. Damiani*, 2 Jacob & Walker, 458. There are various other cases which seem to have found a place by hereditary right in all the successive discussions of this subject, and which, upon examination, will be found to bear only a very distant relation to it. Nothing beyond the slightest hints are to be met with in such cases as that of the *Duke of Chandos v. Talbot*, 2 P. Will. 602; *Wright v. Morley*, 11 Ves. 12; *Carteret v. Paschal*, 3 P. Will. 197; *Anon.* 2 Roll. R. 134.

² 9 Ves. 96. A full note of Lord Hardwicke's judgment in this case will be found in 3 Russell's Ch. Ca. p. 72. The interest agreed to be assigned was a *present* interest.

³ 9 Ves. 100, 102. The opinions ascribed to Lord Hardwicke are discordant. The statement of the facts is too loose and incorrect to be implicitly relied on. Vide *Atk. R.* 549, 551, note by Sanders.

assignable interest. When, therefore, he directed the whole legacy to be transferred to the wife, although there had been a particular assignment of it for valuable consideration, the claim of the widow may have prevailed simply on the ground that the assignees did not claim under an actual assignment for valuable consideration. The chief object which Lord Hardwicke had in view was merely to distinguish between the assignment of a possibility at law, on the one hand, and in equity, on the other; it being, in the former case, inoperative; while, in the latter, a court of equity will sustain it.

These *dicta* of Lord Hardwicke can scarcely be regarded as amounting to more than a very general expression of opinion that the wife's possibility might be assigned by the husband, and that such assignment, though void at law, will be in equity supported, in some events against every person and in all cases against himself. But there appears to be nothing in his language to justify the notion that such assignment can bar the right of the wife surviving.¹ Nor are we led to more precise knowledge of his opinion upon this subject by any thing which fell from him in the case of *Hawkins v. Obyn*,² because any rules established for determining in what cases a husband may or may not be considered as a purchaser, *under a marriage settlement*, of all the present or future fortune of his wife, are totally inapplicable to questions which arise as to how far a husband, not being a purchaser under a marriage settlement, may, for valuable consideration, assign a reversionary interest belonging to the wife. In the former case the question depends upon the agreement into which the parties have entered before marriage, while the wife is free from all control, and when there can be no doubt about her authority to assign to her intended husband any possibility to which she then is or eventually may become entitled. In the latter case, any agreement made prior to the marriage cannot at all affect the inquiry; which must turn upon the extent of the power which the husband is said to acquire by the marriage in the absence of any antecedent contract. No decisive inference can be drawn from the language of Lord Hardwicke in the case of *Hawkins v. Obyn*; and, upon another occasion³, he seems to have thought that an event might have

¹ Sir William Grant considered the decision in the case of *Grey v. Kentish* as recognizing the right of the wife surviving to the whole fund, against the claims, at all events, of the assignees under the general assignment, comprehending reversionary interests which the bankrupt may have in right of his wife.

² Lord Hardwicke, according to the report of that case (2 Atk. 549, 551), is represented as having expressed himself in terms corresponding with the language attributed to him in the cases of *Bates v. Dandy* and of *Grey v. Kentish*.

³ *Bush v. Delway*, 1 Ves. 19, 20. This case is reported likewise in 3 Atk. 533.

happened in which the wife could not have been bound by a covenant of the husband to assign her possibility: and, although the point did not arise in the circumstances which were then immediately under his notice, still, in estimating the weight respectively due to other dicta suggested by analogous cases and proceeding from the same quarter, even an incidental expression of opinion may fairly be thrown into the scale. The propositions embodied in the cases of *Bates v. Dandy* and of *Grey v. Kentish* must, in short, be very materially qualified. The very ground on which Lord Hardwicke, in the case of *Bush v. Delway*, rested the power of the husband to assign the chose in action of the wife was the fact of his being able to reduce it into possession. His assignment or covenant to assign must otherwise have proved inoperative. The subject, therefore, was still left involved in much obscurity, and lawyers were, in practice, not a little perplexed.

Such were the cases which had been discussed and the general principles which had been established, prior to the period when the case of *Hornsby v. Lee* arose.¹ The progress of the current of decisions was then for the first time effectually checked. The new doctrine propounded ought not to have been altogether unexpected. Suspicions might reasonably have been excited in the minds of intelligent lawyers that the stream of decisions had long ceased to flow in its proper channel. By one steady glance at principle and upon the first impression it might have been surmised, that, although in the event of a husband assigning the chose in action of his wife, the assignee could not, at law, be in a better situation than the assignor, who, besides, in order that he might fortify his title against the claim of the wife surviving, was bound to reduce the subject into possession; still, as equity considers such assignment by the husband as amounting to an agreement that he will reduce the property into possession, and further regards that which a party agrees to do as already done, an assignment of the chose in action of the wife by the husband, who had the power of reducing the property into possession, might have been regarded as an effectual reduction; but that, on the other hand, in such cases as admitted not of that act being performed by the husband, his assignment could not have the effect of transferring the property until, by subsequent events, he should be able to reduce it into possession, when, by virtue of the previous assignment operating upon his actual position, the subject matter of the deed might pass. These are views which, independently of all authorities, must suggest themselves to any one reflecting upon the subject.

¹ 2 Madd. Rep. 16.

But enlightened minds refused them access. Members of the bar, eminent for their experience and professional attainments,¹ affected to regard with alarm a recognition of the new doctrine; and dismal forebodings of the ruinous consequences which could not but result from it escaped from them, now and then, in the heat of argument. Equity, it was represented, had thus been poisoned at its fountain head: titles had been wantonly violated; and the fabric of ages was to be overthrown. In the meantime, Sir Thomas Plumer continued inflexible in his opinion.

The facts of the case, which derives an interest from its having been the turning point of the doctrine under review, were simply these:—There had been an assignment by husband and wife of a reversionary interest, belonging to the latter, in certain government securities, for the payment of an annuity granted by the husband. There was subsequently, under an Insolvent Debtors Act, a general assignment of the property of the husband. The person, upon whose death the wife was to become entitled to the stock, died in the lifetime of husband and wife; and the husband, without having done any other act to reduce the stock into possession, died before the wife. A bill was filed by the wife, praying that the stock might be transferred to her. The Master of the Rolls was of opinion that, although a husband has unquestionably a right to the choses in action of his wife, provided these have, in his lifetime, been reduced into possession by him, an assignment of a reversionary interest clearly did not amount to an actual reduction into possession: nay, it could not even be regarded as a constructive reduction into possession, inasmuch as its only effect was to substitute the assignee for the assignor; that is to say, that, in the event of the husband surviving the wife, the assignee would be entitled to the property; while, on the other hand, the wife is entitled, if she happens to survive the husband.

The interest, no doubt, was in that case, contingent; but the decision did not at all turn upon that particular circumstance.

It is not easy to conceive how any doubts upon this point could, after so explicit an expression of opinion on the part of Sir Thomas Plumer, be entertained. But the subject continued to be discussed throughout the profession; and not a few, who unscrupulously attributed the result to hasty and immature consideration of the difficulties surrounding the question, were still unwilling to acquiesce in the principle so recently established.² Accordingly, the same point was once more

¹ Sir Edward Sugden, for instance.

² The soundness of the decree in the case of *Hornsby v. Lee* was questioned

raised before the same judge in the subsequent case of *Purdew v. Jackson*.¹ The doubts which had been thrown over the correctness of the decision in the case of *Hornsby v. Lee* put Sir Thomas Plumer upon his guard, and naturally awakened in him a desire to re-examine the subject, and to sift with the most minute impartiality the train of reasoning by which his mind had been conducted to a conclusion which men of professional distinction refused to recognize as sound, and which had been openly denounced as being totally irreconcilable with established principles of law, as well as fraught with perilous consequences to the security of titles and the various interests of parties. To the case of *Purdew v. Jackson*, therefore, he devoted even more than his usual patience and attention. The simple question was, whether husband and wife having by deed duly executed assigned to a purchaser, for valuable consideration, a moiety of a share of an ascertained fund, in which the wife had a vested² reversionary interest expectant on the death of a tenant for life of the fund; and both the wife and tenant for life having outlived the husband, the wife was, in right of survivorship, entitled to claim her entire share of the fund against the particular assignee: in other words, whether by the deed the vested reversionary interest of the wife had been so assigned, that the right of the purchaser for valuable consideration would prevail over any claim which she, in consequence of her having survived her husband, might set up. The most ample scope was afforded to counsel for the discussion of the point; and all the old arguments in support of the validity of the assignment were reiterated—but in vain. The fact of the interest being, in its very nature, not susceptible of being reduced into possession—a process essential to the exercise of the qualified right possessed by the husband over the chose in action of his wife—formed the

by Mr. Roper, among others, in his *Treatise on the Law of Husband and Wife*, vide p. 202.

¹ 1 Russell's Rep. 1. The notes appended to the report of this case are worthy of careful perusal.

² One distinction, it may be remarked, between the case of *Hornsby v. Lee* and that of *Purdew v. Jackson* is, that in the former the interest of the wife was contingent, whereas, in the latter, the interest of the wife was vested. But, in point of fact, the judgment in the case of *Hornsby v. Lee* did not at all turn upon the contingent nature of that interest. There seems to be no reason why such a distinction, apart from other considerations, should affect the right of the wife by survivorship. Another distinction between these two cases is, that in *Purdew v. Jackson* the assignment was *absolute*, whereas in *Hornsby v. Lee* the assignment was merely a *collateral security*. So that it must be admitted, that these cases are not identical in principle: the main question at issue in the case of *Purdew v. Jackson* had not strictly been decided in that of *Hornsby v. Lee*.

basis of the decision. The right of the husband being nothing higher than a right to possession of the subject when the period arrives at which his wife is entitled to the possession of it, if, in the meantime, he dies, leaving his wife surviving, his right is gone, and that of the surviving wife takes effect. In short, the assignee buys the chance of the husband outliving his wife, or of the reversionary interest falling into possession during the coverture; and he must abide the issue. If the chose in action falls into possession during the coverture and before the death of the husband, the title of the assignee, whether general or particular, prevails against any claim on the part of the wife. Indeed this is the very chance for which a particular assignee, under such circumstances, contracts and pays. His right is gone in the event of the husband dying before the time for reduction into possession arrives:¹ that act being an indispensable preliminary to the husband's having any right of property in himself, or to his acquiring a capacity to convey any right of such property to another.

The Master of the Rolls adopted and adhered to these views, while, at the same time, he expressed the utmost anxiety to determine so important a point upon equitable principles alone, and without allowing his mind to be unduly swayed by any lurking prepossessions in favour of the conclusions at which he had arrived in the case of *Hornsby v. Lee*. He was prepared, upon being convinced that error had been allowed to mingle with the views which had presented themselves to his mind, to have reversed any judgment which had been delivered by him, and to have retracted any opinion which might incidentally have dropped from him.

Notwithstanding the elaborate investigation of this topic by Sir Thomas Plumer, and the unqualified language in which he had expressed the conclusion at which he had arrived, the precise point which had been so distinctly raised and so ably argued in the preceding case of *Purdew v. Jackson* was subsequently brought under the notice of Lord Gifford, at the Rolls; and, at the time of his death, the cause² stood for judgment. It was ultimately decided by Lord Lyndhurst, who had no hesitation in giving his sanction to a doctrine, which was not only in

¹ Accordingly, an assignee of this description guards against such contingency by an insurance effected on the life of the husband: such a precaution had actually been taken in the case of *Purdew v. Jackson*.

² *Honner v. Morton*, 3 Russell's Ch. Rep. p. 65. It may be observed, that the case of *Watson v. Dennis* (3 Russell's Rep. p. 90) stood in the paper for hearing at the same time with that of *Honner v. Morton*; and it was agreed that it should abide the event of the decision in that suit. The bill was filed by a person claiming under an assignment of a married woman's reversionary pro-

strict accordance with general principles, but supported by the expressed opinions of Sir William Grant, and confirmed by two distinct and deliberate decisions of Sir Thomas Plumer. The recognized principle, then, is, that an assignment of an interest belonging to a wife by her husband, who thereby agrees to do every thing in his power to make such assignment effectual, will be valid against the wife only in the event of his being able to reduce it into possession. Reduction into possession is an essential element in the question. If, at the time of the assignment, he is in a condition to reduce the chose in action into possession, the assignment immediately takes effect: if he should subsequently be in a condition to complete a reduction into possession, the assignment will then be valid; but if he dies prior to the happening of the event on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative. Consequently, no assignment by a husband, who afterwards dies, of a reversionary interest of his wife, can be considered valid against her surviving.

These views, however, were not immediately or universally embraced. Finding that courts of equity would not listen to the allegation, that the husband's power over his wife's choses in action is totally independent of any right which she may or may not have to immediate possession; and, consequently, that the reversionary nature of her interest is an element immaterial to the question, those who professed still to be sceptical took boldly another step in advance. No sooner was the process of a prior reduction into possession seriously and successfully urged as a necessary preliminary, in such cases, to the validity of assignment, than recourse was had by counsel to a subtlety which has never been regarded with judicial favour. A legal fiction, under the vague appellation of a "*constructive reduction into possession*," was introduced to the notice of courts of equity. This fallacy originated in erroneous views concerning the nature and effect of an assignment by the husband; which, accordingly, was sometimes considered as operating to change the property, and to divest the right of the wife in her reversionary interest; and, at other times, as a constructive reduction into possession. If it could not reasonably be maintained that there had been an actual reduction, then ingenious men sought to escape from the difficulty, by talking about something or other which they pretended to believe was tantamount to such

property executed by her husband, who afterwards died, in her life time, and before the fund fell into possession. Judgment having been given in the case of *Honner v. Morton*, the cause came on before Sir John Leach, Master of the Rolls, who expressed his full assent to the doctrine which had been established by Sir Thomas Plumer and Lord Lyndhurst.

reduction, and by creating a species of interest which was supposed to be, at one and the same time, in action and in possession ; or, more accurately speaking, a nondescript, which could, and could not possibly, be reduced into possession :—a theory so absurd that it was discountenanced and disclaimed by the highest legal authorities. The assignment, in truth, could have no such effect. An assignment, in its nature and mode of operation, transfers to another the right which the assignor possesses. Even admitting that, in some cases, the assignee may acquire a more extended right than the assignor himself possessed, still the essential character of the thing assigned cannot be altered : the assignor may, perhaps, transfer a higher right than his own ; but he cannot communicate an interest totally distinct from that which he possesses. The thing itself cannot, in passing from one hand to another, undergo an essential transmutation. Whenever there happens to be a present right, the assignment of which is immediately followed by possession of the thing itself, such assignment, being the commencement of that immediate actual possession, may, without much impropriety, be called a constructive possession. But to aver that the assignment of a reversionary interest, which is, at the time, and in its own nature, incapable of being reduced into possession, is, to all intents and purposes, a reduction of it into possession, is neither more nor less than to ascribe to such act and instrument an effect which totally transforms the nature of the thing assigned.

There is another class of cases connected with this topic to which it may be proper to allude before bringing these remarks to a close.

It is an admitted principle that a married woman can consent to grant only that interest which is the creature of a court of equity, viz. the right which equity bestows upon her of claiming a provision, by way of settlement, upon herself and her children, out of property to which the husband is, at law, in her right entitled. But this equity, originating in the legal right of the husband to present possession, rests upon principles wholly inapplicable to reversionary interests which, of course, cannot pass to the husband until they fall into possession ; in other words, until they cease to be reversionary. Accordingly, the propriety of taking the consent of the wife to part with such interest, whether vested or contingent, becomes a much more questionable point.

Although the modern authorities exclude the notion of the husband having an absolute right to bar, by an assignment for valuable consideration, the claims of his wife by survivorship to her reversionary interests, still such an assignment has been,

more than once, held to operate as a complete extinguishment of her right; provided she has, upon examination in court, consented to the execution of it. Lord Alvanley, upon two distinct occasions, is said to have recognized this principle. The facts of these cases,¹ however, are so imperfectly known that upon neither of them is it safe to rely. Their weight, as authorities, has been materially diminished by the language of Sir William Grant, who, upon their being cited before him, as precedents to justify the taking the consent of the wife, expressed great doubt as to the power of the court to accept such consent, on the part of the wife, to a proceeding the object of which was, not merely to bar any equity which she might have to a settlement, but to bar her entire right by survivorship; which was much more than parting with an equity.² In the case of *Woollards v. Crowcher*,³ the object in view was absolutely to defeat the right of the wife by survivorship; and it was only with the utmost reluctance that the consent of the wife was allowed to be taken; and that simply *de bene esse*, so as not unfavourably to affect her ultimate claims, in the event of her being the survivor. But while Sir W. Grant made that concession, he, at the same time, intimated a strong opinion as to what he considered the extent of the husband's power over the reversionary interest of his wife. "If the husband," said

¹ These are the cases of *Hewitt v. Crowcher* (at the Rolls, 20th February, 1800) and *Gregg v. Crowcher*, cited in the case of *Woollards v. Crowcher* (12 Ves. 174). As to the latter, the following facts may be gathered. The children, a son and daughter, were entitled to a contingent reversionary interest in property dependent upon the life of the widow. The son agreed, upon receiving an absolute interest in the sum of 1700*l.*, to release his interest to his sister and her husband. The share remaining to the daughter was 3700*l.* She and her husband contracted for the sale to Crowcher of 1700*l.*, part of the fund, subject to the life estate of the mother. The peculiar ingredient of the case is, that, between the period of the purchase and the time of the decree, the husband and wife, a settlement having been made upon her of the remaining part of the fund of 3700*l.*, went into court, praying a specific performance of the agreement; and that the sum of 1700*l.* might be assigned to Crowcher, subject to the life estate. The wife, being present in court, consented upon examination to such assignment. The bargain was the reverse of being beneficial to her: but, upon being fully informed of her rights, she persisted in the expression of her wishes; and accordingly a specific performance was decreed.

² Notwithstanding this very unequivocal expression of his opinion, his Honor, it would appear, in a subsequent case (*Howard v. Damiani*, 2 Jac. & Walk. 258) took the consent of a married woman, not *de bene esse* but absolutely. The case, it is said, was heard by consent of parties. The order, at all events, is so directly at variance with the deliberate judgment pronounced in the case of *Woollards v. Crowcher*, that doubts have been entertained as to the accuracy of the statement of facts as they are represented in the report of the case of *Howard v. Damiani*.

³ 12 Ves. 177.

he, "has a right to convey, let him exercise that right. But why this court should join and aid him for that purpose I do not know."

And, finally, even these decisions, qualified in principle and guarded in language though they are, so far as they recognize the principle that the consent of the wife may be taken to bar her own right by survivorship, have been more recently and by no common authority approved. In the case of *Pickard v. Roberts*,¹ to be sure, there was no assignment by the husband, the sole object of the petition and the consent being to transfer a reversionary interest of the wife to the immediate possession of her husband; but the decision turned expressly upon the principle that the court had no authority to take the consent of a married woman to any course of proceeding which was to terminate in her being deprived of her right by survivorship:—a title so inherent in her that it cannot be weakened even by deed executed, upon a separation carried into effect between herself and her husband.²

The general result, therefore, appears to be, that the wife will not be permitted to abandon her title by survivorship to her reversionary interests by her consent in court, in favour of a purchaser for valuable consideration;³ nor in favour of her husband;⁴ nor by deed, in favour of her husband;⁵ and, above all, that the husband cannot bar such future interests of the wife as those, the nature and incidents of which we have been rapidly reviewing, by a mere transfer for valuable consideration. If it were otherwise, in this last instance, the admission or rejection of her consent must have been nothing more than a nugatory form.⁶

E. R.

¹ 3 Madd. R. 384.

² *Stamper v. Barker*, 5 Madd. R. 157.

³ *Woollards v. Crowcher*, 12 Ves. 177.

⁴ *Pickard v. Roberts*, 3 Madd. R. 384.

⁵ *Stamper v. Barker*, 5 Madd. 157.

⁶ *White v. St. Barbe*, 1 Ves. & Bea. 405. This last authority is, indeed, only an *obiter dictum*; but it is a very pointed one.

ART. VIII.—MEMOIR OF O'CONNELL.

IT would be hard to find any country which to the moral or political philosopher presents so many points of interest as Ireland. Famine-stricken inhabitants of a most productive soil—pauperized fellow subjects of the richest empire of the world—superstitiously rigid adherents of a creed which prohibits murder, yet stained with murder, as though, like the Eastern Thugs, they deemed it an acceptable sacrifice—indolent, yet capable of most laborious exertion—brave and generous, yet cruel, cowardly and mean. It is not that we find in Ireland representatives of all these characteristics, here one, there another; but that a large proportion of the population displays them all, and a thousand less important but equally contradictory attributes at once: this is what astonishes and perplexes all who examine her history for past ages, or her actual condition at the present day. At the present day, after Ireland has for centuries enjoyed community of laws, of free institutions with England—after we have taught her arts and encouraged her manufactures and infused our very blood into her veins, until a large proportion of her children are more of Saxon than of Celtic race—she still remains, as a nation, as far below the average development, as Great Britain, as a nation, exceeds that average. Nor do we compare the moral and social development of the Irish with that in England only, or the southern parts of Scotland. The hereditary differences of disposition which are always observed to follow difference of race, might be sufficient to account for the contrast. But upon comparing the development in Ireland with that among the kindred races in Wales and Scotland—a comparison in which those hereditary differences cannot be taken into consideration—we find a most striking variety of result. And this variety bids us look for some ingredient which, like the poisonous reptile lurking unseen in the fountain, thus turns the source of life and health in one kingdom into a copious stream of maleficence and calamity in the other. That for which we look is not far to seek—it comes forward to meet us and proclaims itself—it is oppression. Oppression, at last interrupted and finally overborne: the resistance to which is detailed in the most glorious, as it was the longest, portion of the life of the extraordinary man whose name is prefixed to this notice.

DANIEL O'CONNELL was born at Cahirciveen, in the county of Kerry, on the 6th of August, 1775, the year I. of the Re-

public of the United States of America. His family traced back their origin obscurely but undoubtedly for four or five centuries, so far as the fourteenth century, at which time the O'Connells were already the chiefs of a petty sept who inhabited the same spot where their more celebrated descendant was born, and the chieftainship descended upon him accordingly. O'Connell, however, does not require any long descended line of progenitors to illustrate his history. Great celebrities throw light back into remote ages from which they can gain no splendour in return: and while the unshorn taniest of an inconsiderable clan may be well distinguished as the ancestor of "the liberator," the latter may be easier ascertained by his actions than by his pedigree. "I am the Rudolph of Hapsburg of my family," said Napoleon to his imperial father-in-law, when the latter was endeavouring to trace his connexion with the Dukes of Treviso: "the patent of my nobility dates from the battle of Montenotte," said he on another occasion to the genealogists who were establishing his descent from an ancient line of Gothic princes. Yet, though O'Connell could, like Napoleon, have afforded to forego any brilliancy derived solely from ancestry, it was of no small advantage to him throughout his career to be the chief of a well-known name. His collateral relations were extremely numerous. He had himself nine brothers and sisters—his grandmother had twenty-two children, who emulated though they could not rival so prolific a parentage. O'Connell therefore, on his first entrance into notice, found himself the recognized head of a clan who looked up to him with the ardour and affection, beyond that of feudal attachment, which characterizes this connexion among people of the Celtic race. And this was of considerable advantage to him in a professional view, before he had attained any established position as the leader of a political party. Everywhere on the Munster circuit he found himself among his clansmen, or those who were willing to be considered so, and the number and zeal of these increased as his fame grew more established. To the political leader such a "following" possessed advantages even beyond those which it offered to the rising barrister. And by a man of O'Connell's frank manners and social disposition, third cousins' claims were admitted without much examination—the pleasure in the recognition was mutual—to the one, that he had gained another devoted follower, to the other, that he had devoted himself to, and had his claim recognized by, the chief of chiefs—the man of all the world—the "liberator."

Debarred by his religion from prosecuting his studies at Trinity College, Dublin, young O'Connell went abroad to finish

his education, and successively attended the colleges of Louvain, St. Omer and Douay. He returned in 1794, deeply imbued with a horror of the enormities which France had just perpetrated: a horror of which traces are not faintly visible, when in the latter years of his life he laboured to restrain the violence of the madmen whose understandings he had himself deranged. Many anecdotes are told illustrative of this horror, one in particular, of his meeting on board of the vessel in which he was returning to Ireland one of his countrymen, who had been his companion at St. Omer, and was now like him returning on the opening of hostilities in 1793—but filled with admiration of the atrocities which had taken place. In the heat of conversation, not perceiving or disregarding the very different emotions of his companion, he at length displayed in triumph a handkerchief stained in the blood of the Queen. O'Connell conceived a horror at the sight which never was obliterated from his recollection. Indeed, there was nothing in the French Revolution which could be attractive to O'Connell's mind. From the first to the last of his career he was always the most steadfast opponent of actual violence. Demagogue as he was, there was never anything tending to democracy in his principles, secret or avowed. Doubly odious then as the sanguinary democracy of the Jacobins must have been to him, with what additional abhorrence must he have viewed their exterminating fury towards a church, to whose least observances he was always superstitiously attached?

Shortly after O'Connell's return to Ireland, the disabilities laid upon Catholics were removed so far as to permit them to follow the profession of the bar. Taking advantage of this foretaste of emancipation, he was called to the bar in Easter Term, 1798, and almost immediately became remarkable as a rising man, not only among the Catholics, but among the whole bar. And two years afterwards he made his first entry into public political life, singularly enough, by a speech on the same subject and on the same side as that question, his advocacy of which rendered him in the last days of his life famous, infamous, despotic and impotent. His first address in public was delivered at the meeting of the Catholics in the Exchange at Dublin against the (then) projected Union with Great Britain. Since that time, his biography is the history of the æsthetics, and something more, of the Irish people. That history contains little beyond a narration of the affairs—

Quæque ipse gravissima vidit
Et quorum pars magna fuit."

The life of O'Connell was made up of two great struggles—the struggle for emancipation; and, when that was obtained, the struggle for repeal. His fame will be grounded upon the answer which posterity will give to these two questions. He struggled for emancipation; was he right or was he wrong? He agitated for repeal; was he right or was he wrong? His panegyrists and his accusers generally take either one question or the other, not both at once; or they regard the abstract question itself, and altogether lay out of view the mode in which he endeavoured to effect his object. Again, a partial view is often taken of O'Connell's character, by neglecting to give full weight to the attachment he felt towards his religious creed, and towards his worldly profession.

An unhesitating, unquestioning devotee of the Church of Rome, he never suffered the thronging events of one of the busiest lives ever passed upon this earth to jostle from its due observance any circumstance of a ritual so exigent of ceremony. This peculiar feature in his character and practice was from his earliest entry into public life very remarkable. A firm, conscientious belief, such as his, in every article of the Roman Catholic faith, is rare among men. Among men of the world it is rare; still less should we expect it in a shrewd lawyer, practised, triumphant in sifting evidence, in detecting fraud. How strong must in O'Connell have been the instinct of veneration, or the impress of early education! And it is the more deserving of remark, because even in his own party such instances are rare: because this open, punctilious attention to every religious duty of a Church, whose ritual enjoins so many formalities, provoked sneers and suspicions even among his own party, and open derision among his opponents. But O'Connell gloried in the contumely with which his creed was regarded during the first half century of his life. Remarkd at college for his strict spirit of monastic devotion, he never disguised his attachment either among the jolly counsellors of the Munster circuit in the beginning of his career, nor in the House of Commons, when called upon in 1829 to take the oath after his first election for Clare;¹ and in the last moments of his life he manifested the

¹ The oath which declares that the Pope neither hath nor ought to have any *spiritual* power or dominion within this realm. O'Connell, introduced into the House, and required to take this oath, read it deliberately through, aloud. "I see in this oath," said he, "one assertion as to a matter of fact, which I know to be false; and another assertion as to a matter of opinion, which I believe to be false. I therefore decline to take this oath." The Emancipation Act had then received the royal assent; but as O'Connell, on his first election for Clare (the one in question), had been returned before the act came in force, the speaker decided that he was not upon that occasion entitled to the benefit of it.

same intense and undying devotion in the well known bequest of his heart to Rome. He appeared, indeed, in the winning light of the uncompromising champion of a nation contending for the removal of civil disabilities on religious grounds: but nothing which he ever said or did proves, or goes to prove, that had the inequality been the other way,—had the Orange party been struggling under disabilities which they were endeavouring to remove, O'Connell might not have been as vehement a denouncer of Protestants as he was an heroic champion of the Catholics. His language on the occasion of the struggle in France in 1830 between the Liberals, endeavouring to shake off the trammels which fanaticism had induced Charles X. to impose, shows with sufficient clearness what part he would have taken had he been a Frenchman, and an adviser of the sovereign. It is evident that he saw in that revolution not the struggle of a free people against an attempted despotism, but a contest between the Church, *his* Church, and infidelity.

This peculiar feature in O'Connell's character cannot of course stand out so strongly in his contest for repeal, as it did in the earlier struggle for emancipation. But so deep-seated and heartfelt as it was, its influence could scarcely forbear making itself felt in every variety of pursuit. In particular, the Jesuitical maxim that we *may* do evil in order that good may come, too often encouraged him to make declarations of convictions, which he never felt, and promises which he had no hope, nor perhaps even wish, to fulfil.

It would otherwise be difficult to account for the inaccuracy of statement he came at length to display: whether he deluded the mob into the expectation of repeal within the year, or amused them by fictitious anecdotes of his political opponents, to give vent to his fierce abuse. But these impromptu misrepresentations are much less surprising than the more deliberate misstatements in which he often persisted to the last; and of which no exposure, however public, however repeated, seemed to mortify, or even convince him. There seems to have been in these cases, not merely a stubbornness that would not retract, an audacity that could not blush, but a degree of conviction, the result of some mental process by which he had persuaded himself that he was in the right, or not altogether in the wrong. And this effect might to some degree be produced by his legal studies. For however the study of law as a science is calculated to give enlarged and accurate ideas, it is certain that the study and practice of it as a profession produces a directly opposite effect. The accuracy which it requires is as necessary in small matters as in great; and the attention being rigorously bent upon ques-

tions of detail, the student over-estimates their real importance, and becomes careless or even incapable of appreciating an extensive subject. Now that this was in some instances O'Connell's case, we have no doubt. In the course of his extensive and eminently successful practice at the bar, he found that minor errors and inaccuracies were as fatal to a case in a court of law as objections taken on the broadest foundation. He had the same unreasoning attachment to his profession as to his religion: every quirk and quibble had to him peculiar charms. Nor was it only the intricacies of the theory which delighted him; the perplexities and stumbling-blocks of the practice were equally familiar and equally dear: and to found his case or surprise a judgment by means of his acquaintance with them was to him as meritorious as any argument founded on the merits or drawn from the purest principles of law. And he brought to the political arena not only the habits of mind which such a previous course of practice would generate, but he imported with him the very same subtleties which had been so successful in another sphere. On the floor of the House of Commons, in the addresses which, by means of the daily press, he so constantly presented to the nation, he generally confined himself to vituperation or declamation. But if he put forward any reasoning or arguments, and particularly in his many battles against proclamations and acts of parliament, which interfered with his turbulent practices, we find that he distinguished cases and refined upon imaginary differences as if he had been contending in one of the four courts, and expected the same success. But that mixture of subtlety and boldness which so often enabled him to cajole a jury or persuade a court was as little suited to the audience before whom he now tried it, as was the daring vituperation which he found so successful at the Corn Exchange. The disappointment kindled his rage: and a certain feeling of indignation—for we cannot help thinking that he generally succeeded in deceiving himself into the belief that he was right—a feeling of indignation that arguments, which to his mind made out at least a *prima facie* case, should be laughed down without even the honour of an attempted answer, increased his rage to fury.

We must carefully keep both these leading characteristics in view in endeavouring to form an estimate of his character. And not less carefully must we keep before our view both of the great struggles to which he devoted himself, and the manner in which he conducted each; not suffering any prejudice in favour or against either or both his objects to blind us against him or his motives. For there are many who, detesting the intended

dismemberer of the empire, forget that he was for long the only or the principal champion of religious liberty: and others, who though equally adverse to repeal, suffer their admiration of the emancipator to conceal the agitation of his latter years. Many, again, hold repeal in such detestation, and are so little friendly to the measures for emancipating Catholics, that they perceive no virtue or talent in the man, whom alone they hold responsible for both. Some hold the objects for which he contended in such esteem, that they forget or pardon all errors of motive or of conduct in prosecuting them: others, again, in such abhorrence, that they cannot believe anything to exist of innocence in his motives, of accidental error in his conduct; but that every motive was bad, every error wilful.

We have already expressed an opinion that O'Connell was not, in his contest on behalf of the Catholics, actuated by the high principle of action for which so many, especially upon the continent of Europe, then and now give him credit. He was not the champion of civil and religious liberty: a war-cry often raised most lustily by those least capable of understanding it, and least willing to practise it. A Catholic, loving with all his heart and soul the Church in which he had been educated, he found the object of his veneration oppressed and despised, and felt too that this oppression and contempt pressed hardly on himself. And although we do not consider he deserves to be stigmatised as a selfish man, we cannot but feel that he was actuated by at least an average amount of that love of ease and fear of danger, which are in fact the only indications of selfishness. If we are reminded of his laborious exertions and daring defiance of authority, we must observe, that gifted by nature with the frame and constitution of a giant, exertion was to him less irksome than to most men—that in all his contentions with government, he “still kept o’ the windy side of the law;” and, in effect, for all his labours, and all his dangers, had he not his reward—were they not necessary to be undergone by the chief of a party? Not solely the love of freedom, then, or hatred of tyranny, called him to the battle. Ambition invited him to place himself at the head of a party, a nation, whom he felt himself competent to lead; religious zeal sanctified his object, and opened a larger armoury of weapons than could be employed in a merely temporal cause; personal restrictions and galling disabilities roused every more worldly passion in his deep and passionate nature, and stimulated every nerve to violent action. Party feuds and personal animosities soon came to give sharper point and more steady direction to his attacks, until he found himself overborne by a system of agitation, which

he had spent his life in creating; like one who, having with difficulty dragged a great stone over the edge of a declivity, as soon as the mass is put in motion, finds himself compelled to exert every muscle to keep clear of a ruin which overwhelms him at last.

Although we cannot, without exposing ourselves to the censure which we have passed upon O'Connell's insincerity, adopt the Jesuitical maxim that the end sanctifies the means; admitting in its full force that political axiom, ever to be kept in mind by British statesmen, that though what is just and right may be on some occasions not expedient, nothing can ever be expedient which is not just and right; still there are circumstances which justify the employment of means on ordinary occasions unlawful. Love and war are proverbial exceptions. And in general, though force is unlawful, yet it is permitted to employ it defensively, to preserve or to regain liberty or property. And if the struggle for Catholic emancipation were a purely defensive movement, as it surely was originally, though the position once gained was liable to be converted to offensive purposes; if a man's being a Roman Catholic was no just ground for debarring him from the exercise of those civil rights accorded to all the rest of his fellow-subjects of every religious denomination; as of course it would be very difficult to convince a Catholic that it was; and above all, if it could be clearly shown that the Catholics had been actually in the enjoyment of equal civil rights, and had only been deprived of them by force; if all this were so, a Catholic might easily, we conceive, be convinced that even force was allowable to assert and regain those civil rights from which he and five or six millions of his fellow subjects had been forcibly debarred. And as the greater includes the less, threats of force, and ostentatious preparations intended to effect the same object by intimidation, would seem still more clearly allowable. Let us be understood. We do not undertake the defence of those who, like O'Connell, parade hundreds of thousands of ignorant peasants, seduced by chimerical expectations and love of idleness, away from those industrial occupations which alone can give that wealth to Ireland which she is taught to expect by a repeal of the Union. Nor are we unaware of the danger in applying the argument; since it would, as far as it goes, justify the employment of force to advance any political movement which had for its object the acquisition or restoration of some supposed right. But we merely state it, to show how easily an Irish Catholic might conscientiously justify himself for having recourse in the pursuit of emancipation to an agitation which almost amounted to rebellion; and

which, after the result of the state prosecutions in 1831-32 and 1843-44, no one can dispute, did amount to sedition.

We see, in effect, the dangers to which such a line of argument carries those who follow it in the history of the repeal agitation. If it can be listened to on the question of emancipation, it cannot be endured for a moment on the question of repeal. The Catholic disabilities were imposed and maintained at the point of the bayonet and the edge of the sword. The Union was a voluntary act by which the representatives of two kingdoms merged their separate existences into one. That Union being voluntary, cannot lawfully be dissolved by force; entered into by two parties, it cannot lawfully be dissolved at the mere will of either. If England wished to dissolve the connection, could it with any show of justice do so against the wishes of Ireland? The very first reason for the employment of force in the one case is wanting in the other, viz. that it is employed to regain what was lost by violence. Nor is it of any avail to talk of the corrupt influences exerted upon one of the contracting parties, or that the Irish legislature did not properly represent the nation. If national acts could be set aside on grounds such as these, there could be no stability in public affairs. It is utterly impossible that a nation can ever be exactly represented; or that in an assembly of three hundred representatives there should be unanimity, or that a government should give places of trust and profit to those who thwart and oppose the measures of that government. And until all this is otherwise, it will be easy to call out that the nation is not duly represented: that half the nation refuse their consent; that those who assent are influenced by improper motives. We do not deny that the facts are as stated by the Repealers; that the people, *quæ* people, were virtually non-represented in the Irish House of Commons of 1799-1800; that there was a large minority, formidable from its numbers, still more respectable from the disinterestedness and talent it contained; that a venal and profligate majority nevertheless was found to give the national confirmation to the Act of Union—this venal and profligate majority however, whom modern Irishmen hold up to execration, being the majority of the nobility and leading gentry of the island.¹ We grant to the Repealers that Ireland

¹ Some idea of the extent of the corruption may be gained from a note of one or two items in the list of bribes. There were created (out of the dominant party of course) from the 30th of July to the 6th of August, 1800, fourteen barons, one viscount, seven earls and five marquisses. Seven of the government adherents in the House of Commons were within a short time appointed judges of the Court of Error in Ireland; of whom there are twelve. Eighty-

(which has since been ruined by the operation of the Union) was then in the situation of possessing a rebellious population yet panting from open insurrection; a selfish and corrupt aristocracy, chaffering away what they considered the independence of their country for Saxon gold; and two sets of clergy, hounding on opposite parties to open revenge for open wrongs (a state of things very liable to be made worse by the Union or any thing else). What then? The only means of saving Ireland under such desperate circumstances was indissolubly to link her fate to that of England. The more desperate the disorder, the more apparent did that necessity become; and the more generous was it in the more powerful state to devote herself to so dangerous a task. And as to the corruption of the legislature, that was one of the evils to be remedied; and it was, after all, the only legislature to treat with, and there was but one mode of treating with it. What would modern Irishmen have said if Pitt, himself a model of disinterestedness, had in virtuous indignation ignored the whole Irish House of Commons? What a howl of indignation would have been raised at such contumelious treatment, however well merited!

But proceeding from the mode of obtaining the ratification of the Act of Union to the Union itself, there are and can be but three different opinions with regard to it. The first is, the opinion of those who think that an intimate, an entire union between Great Britain and Ireland, is the most probable and effectual means of enlarging and securing the prosperity of Ireland. To this opinion a majority in this country adhere; and with all who hold this opinion we cordially agree. A second opinion, which is that generally put forward by O'Connell and those who followed him while alive, and since his death maintain the agitation to which he gave birth, is, that connection indeed with Great Britain is essential to the prosperity of Ireland, but that union is destructive to it. The supporters of this doctrine are so many and so talented, that great weight would be due to the mere expression of their opinion, were they not unfortunately open, with very few exceptions, to the charges either of wilful misrepresentation, or of passionate ingrained prejudices, or of interested views of the meanest description; charges which have so much at least of *primâ facie* foundation as to induce us, laying aside authority, to examine the argu-

three borough proprietors received a douceur under the title of compensation, at the rate of fifteen thousand pounds a seat. The inadequacy of the representation, in consequence of the disabilities of Catholics, may be conceived from the fact that seventeen boroughs, returning thirty-one members, mustered only forty-eight electors altogether.

ments on the opposite side, without deferring too much to the *ipse dixi* of any debater. Now it has been well observed, that in an ordinary mode of reasoning one would say, that if British connection were essential to Irish prosperity, then the closer that connection the greater will be that prosperity; unless it could be shown that the connection, when it has approached to a certain degree of proximity, changes at once its nature like some physical powers, which are attractive to a certain distance and then at once become repulsive. O'Connell and his followers of the Repeal Association ostentatiously upheld the preservation of one bond of connection, the crown. There are other bonds, in the identity of language, the intermixture of blood, the similarity of laws, the unity and comradeship, side by side in dangers by sea and in the battle-field, which have in fact blended the two nations, and rendered all efforts at a disruption of the social union unavailing; but setting this aside, the constitutional bond which the Repeal Association proposes to retain is the identity of the crown. The bond against which they contend and struggle is the identity of legislature. But the union which depends only upon the first bond may be interrupted or destroyed by many foreseen and many unforeseen circumstances; and there are not wanting the warnings of history pointing out how, upon more than one occasion, Scotland and Ireland have both in their turn been on the brink of a separation, and of being set up into an independent kingdom. But the Union which is founded on identity of legislature can meet with no impediment in its operation, and can only be destroyed by that which can never be taken into consideration, a dissolution of the government itself.

But it is very necessary to the understanding of the whole question that we should accurately define what is meant by the word connection. It cannot be meant by the British connection, on which Irish prosperity is said to depend, that the trade and manufactures of Great Britain are to be crippled in operation and limited in extent in order that those of Ireland may be invigorated and enlarged. Neither can it be meant by British connection, that the lands and property of Great Britain are to be mortgaged to the last guinea in building, equipping and maintaining fleets for the protection of the coasts and commerce of Ireland. Such views are too openly selfish, too palpably unjust to be entertained for a moment. Is it meant by British connection that, when Ireland shall have become rich and powerful, and shall have established a beneficial commerce with France, Spain and Holland, and Great Britain shall have declared war upon any of those countries,—is it meant by British connection

that Ireland shall be at liberty to remain at peace and to prosecute her commercial advantages, leaving England to fight her own battles? But it is manifest that conduct such as this would be a direct separation. And if none of all this is intended, what can be meant by British connection except this—that Great Britain and Ireland shall for ever have the same friends and the same enemies, that they shall have a common strength, supported by a common purse, to which each shall contribute according to her strength; that this common strength shall be directed by a unity or rather an identity of councils; that England shall make no laws injurious to Ireland, nor Ireland any injurious to England; that there shall be no commercial jealousies, but a constant reciprocation of benefits; in a word, that Great Britain and Ireland shall be like the two arms of the body, never disposed to beat or quarrel with one another, but always ready to unite their efforts in defence of the common body from whence they derive their strength and vigour? If all this be meant by British connection, wherein does it differ, save in name and efficiency, from British union? And if less than this be meant, British connection will be destitute of that stability necessary to secure the permanency of Irish prosperity.

There is another opinion which may prevail in Ireland and elsewhere on this subject—that every description of British connection and British union are equally and irreconcilably hostile to the interests of Ireland. This opinion is not, however, often publicly expressed, or, if expressed, it is not insisted upon as a practical doctrine. Not to call every man a rebel and a traitor who may differ from us, and who may privately maintain such an opinion as a speculative point, we will say that, whoever maintains it, it is a preposterous opinion—an opinion not supported by any experience derived from the history of nations—not bottomed upon any knowledge of human nature, and totally devoid of that first feature of political wisdom—foresight.

“I will speak my whole mind on this point,” says a right reverend prelate in one of the debates at the time of the Union: “Ireland, as a graft inserted into the stock of the British empire, may throw out branches in every direction, and bear fruit on every twig; but if you separate it from this connection, and cast it on the ground by itself, it will neither strike root downwards nor bear fruit upwards, though it should be left to itself, free from the annoyance of its neighbours. But this Irish graft cannot be left to itself; it will be either stunted and overshadowed by the mighty branch of the British oak, or it will be poisoned by the pestilential exhalations of the trees of liberty which France will plant around it,—trees which have hitherto produced no fruit in Europe or in the world, save such as the apples of

Sodom, alluring to the eye, bitter and poisonous to the palate. Ireland cannot stand alone. Would to God that there was moderation and justice enough in the great states to permit lesser states to enjoy their independence and to prosecute their interests in a state of separation from them ! But in the present condition of Christian morality this is a system of politics more to be wished for than expected. Ireland cannot stand alone ; she must of necessity be connected, nay, she must be united either to Great Britain or to France : she is not, indeed, at liberty to make her choice without withdrawing that allegiance which we are convinced the best and wisest men in Ireland have no disposition to withdraw ; but if she were unfettered by any bond of connection—at full liberty to make her choice, is there a man in all Ireland with a good heart and a cool head who could hesitate in preferring a union with Great Britain to one with France ?”

“ Is there a man in all Ireland with a good heart and a cool head ?” Oh question, now, as fifty years ago, perplexing to the last extremity to be answered ! Cool heads or hot heads, however, there are very few, if any, who now would advocate the entire separation of Ireland from England, much less her union with France. On the contrary, the professions of loyalty to the crown are ostentatiously loud ; as if the repealers were inwardly conscious that the charges of their opponents were, to some extent at least, well founded—that the repeal of the Union would lead to the disruption of all connection between the two islands, whether such a consummation were contemplated or not by the repealers themselves. Some attention, it is true, has been of late attracted by the expressions employed by American democrats, but they have not been very warmly received.

These views must have presented themselves to O'Connell's mind if he cast one thought upon the present circumstances of affairs, or on their future consequences when he undertook his mission of repeal. They can hardly be new to any repealer of the present day who has not shut his ears to the narrative of history and to the arguments of reason. In a choice of evils, certainly, choose the least ; but the agitation which he preferred is so great an evil, so destructive in its immediate effects, so fatal in its possible results, so indefinite in its duration, that the evil to which such an agitation was deliberately preferred must be gigantic indeed. What would be the surprise of an enlightened politician, removed from the strife of party, to learn that the Union sought to be removed by this agitation was denied by the majority, the very large majority of those interested, to be a cause of the grievances complained of?—to learn that that Union was, on the contrary, believed by the majority to be a protection and an assistance to the weaker country, and that

the arguments by which it was sought to connect those grievances were, in many instances, strained in reasoning and false in statements of facts?—that in many instances they were preposterously out of place; and, what is most suspicious, that, from the character of the agitators, from the means they employed, the language they held, full of impotent promises and as impotent threats, and the influence and pecuniary advantages they derived from the agitation itself, there was room to attribute their conduct to motives of the most sordid character? But let an author be heard on this point, speaking to O'Connell's views and motives, whose knowledge of the country and the people of Ireland renders his a voice potential on the question:—

“Let no one think that O'Connell had no opinions in favour of repeal. It is probably the truth that he cared nearly as much for repeal as for emancipation. The Catholic question was to him rather Irish than liberal, and repeal was in his eyes only another sort of Catholic emancipation. He had some convictions, strong ambition, and was rather reckless how he gratified that ambition. Such, perhaps, is a fair account of his state of mind in 1829. However, the country received his new announcement with great coldness, and no one could believe he was serious in taking up repeal. His conduct was condemned by a large portion of the Catholic body. But O'Connell knew Ireland well, and, possessing a thorough knowledge of the means by which the passions of his countrymen are roused, resolved that every grievance should be connected with the cause of repeal. Every wrong act of the government he determined to convert into an argument for the necessity of an independent parliament. Having once planned his campaign, there was no great difficulty to a man of his matchless popular powers in carrying his designs into immediate execution, so far at least as to excite an agitation of which he should be the presiding spirit.”¹

Long accustomed to popular tumult and to popular sway, O'Connell could not contemplate unmoved the term when Catholic Emancipation should take away from him the groundwork of his agitation; and we find him even in the moment of exultation and of success, bringing forward in very plain terms the new and indeed the only other subject which should continue to engross his attention and the nation's. In his address to the electors of Clare previous to his first election for that county in 1829, he intimated his intention to bring the question of the Repeal of the Union before the consideration of the legislature at the earliest possible period. And a similar paragraph appears in the address to the electors previous to his re-election. These are the earliest public indications of the new

¹ Ireland and its Rulers, vol. ii. p. 59.

topic which was to convulse Ireland. The earliest speech he made on the subject was at a meeting in Dublin previous to his re-election in the month of June, 1829, when he insisted at length on the necessity for a separate parliament in College Green. And shortly afterwards, at the Corn Exchange, he began that extraordinary system of promises, the popular belief in which no disappointment seemed to stagger, by prophesying "that there would within three years be an Irish parliament in College Green."

It has been remarked by a writer already referred to, that throughout the long series of alternate popular triumph and popular defeat, from the time of the United Irishmen, through the battle of the Union, up to the close of the year 1829, the Irish populace had always had a strong feeling towards the aristocracy. There was always a leniency to the faults and a hearty acknowledgment and pride in the virtues of the "real gentleman," the man of station and connexions, that was never shown by the people to one of themselves. And it forms accordingly one of his most serious grounds of accusation against the Irish aristocracy, that they have, notwithstanding this bias in their favour, completely lost all the advantage which the prestige of station, the influence of wealth and connection, and superiority of education, have given and secured to the upper classes in other nations, in which the people were not nearly so ready as in Ireland to admit any superiority of pretension. Whatever justice there may be in this accusation it had no place until after the commencement of the new agitation. At the election of 1832 the change in popular feeling was sufficiently manifest. The old families that had in every state of popular excitement retained their family boroughs as securely as their family titles, were at once brought rudely to a dead stop. Nay, men that had served long and gallantly in the Catholic cause,—men whose names appear in the forlorn hope in the first years of the Catholic Association, met with defeat now, in the earliest years of Catholic freedom, at the hands of Protestant opponents. Thus Feargus O'Connor (who then emerged at once from obscurity into the din of partisanship, when he

—like a comet, from his horrid hair
Shook pestilence and war—)

an unknown, untried man, and a Protestant, successfully contested the great county of Cork—a constituency which in Ireland answers to the West Riding in England—against W. Roche, a Catholic of the first families in the county. It was in that same election too, and on the same Repeal cry, that W. Roche,

a Protestant, defeated Barry, one of the Catholic Association, for the city of Limerick. In a word, at the elections of 1832 the only test of the popularity of a candidate was his opinion on the question of Repeal; and the religion of a candidate, or his disposition on religious questions, once the all-important interrogatory, his station in life and his previous opinions, sank into comparative insignificance.

That the mere Repeal of the Union itself was esteemed of minor importance by those who led the cry in pursuit of it, may well be believed. At the county of Waterford election in 1833, Mr. Villiers elicited from Sir R. Keane the too-candid expression "I will hold the Repeal question *as an imposing weapon* to get justice for Ireland." And although Repealers could not be always thrown off their guard sufficiently to profess the same views, there could never be much doubt that such were the views of many, if not all, of the principal leaders, intending, under the specious expression of "*justice to Ireland*," the extinction of tithes, the extension of the franchise, corporation reform, &c. But these objects ought to have been openly avowed and demanded. Even if they had been refused, as would most probably have been the case with some if not all of the demands, it would have been mere childishness on that account to dissolve the Union. The cry of Repeal is in fact precisely the "Then I won't play" of a sulky schoolboy. If you object to abolish tithes, "Oh, then we'll have Repeal!" is the observation. "How's that, umpire?"—"Out." "*Then I won't play.*" But much more preposterous conduct was it to hold the question *in terrorem* over England, as the more intelligent Repealers without question intended, thinking it a wise plan to try to frighten the Imperial government into such indefinite concessions as the promise to do justice to Ireland would amount to. Justice to Ireland! and demanded in louder tones than even they had ever used by the very men whose voices had scarcely ceased from describing the peace and tranquillity which would follow the grant of Catholic Emancipation! So far from either frightening England or making her feel liberal towards Ireland, the agitation only served to excite mistrust and disgust. The No Popery cry, which was beginning to subside, again rose more vigorous than at first; and not the cry only, but the anti-Popery spirit took firmer hold and a wider range, and remains in increased strength to the present day. So great were the disappointment and disgust at the insincerity of the Catholic leaders.

Since the time of Wolsey no statesman's fall has been so full of moral as O'Connell's: not Napoleon's. Had he suddenly

died four years sooner, every one would have felt that beyond question or comparison the first political power in Europe had departed, and the balance of parties would have rocked to and fro, and the Stock Exchange would have been convulsed. But when he expired last May curiosity was excited, and philosophical philanthropists made stilted funeral orations; friends wept and even his opponents pitied, for no man had more attached friends, and political hatred rarely survives in much bitterness, at least in these days, departed power. And his power had long since departed from between his hands. The result of the government prosecution in 1843-4 had been fatal to him. The confinement, though neither strict nor long, though cheered by the society of friends and varied in its monotony by banquets and sympathizing addresses, was yet irksome in the highest degree to a man of his ardent temperament and habits of activity amounting to restlessness. Nor could he, though his sentence was reversed at last, conceal from himself nor from his followers that his infallibility, his legal infallibility, had fallen before that of his opponent—the legal vinegar cruet, as he termed him. Although one judge held it to be a fatal defect in the form of his trial that the list of the Dublin grand jurymen had been mutilated—although another held that in point of form a man who had been tried for one sedition could not be condemned for fourteen—it by degrees became perfectly apparent to every understanding that O'Connell had been wrong in point of law and his opponents right, and that whatever informalities had been suffered in that Titanic trial to escape the notice of the Crown lawyers, O'Connell and the traversers had in point of fact committed the acts of which they stood charged, and that in point of law those acts did amount to sedition. As this gained ground the confidence of his followers in the legal knowledge and wary circumspection of the leader sustained a grievous blow. Then came all his broken pledges of success, his breaches of promises to obtain Repeal—breaches more palpable and impossible to be explained away, because he had fallen into the fatal error of committing himself to a given time for the completion of his promise. "He who gains time gains everything," says Baroni to Tancred, but it hardly appears to have been worth gaining so short a time by so great a risk.¹ And when

¹ We are irresistibly reminded of the story of the wise Eastern physician, who, being commanded by the Sultaun, upon pain of death, to teach an ass to speak, undertook to do so in a given number of years, and on being remonstrated with for his madness in thus condemning himself to die when those years were out. "Friend," answered the sage, "had I not done so I must have died to-day; now in the years I have obtained, the Sultaun may die, the ass may die, or I myself

once his crew began to reason, submission was at an end. The scales at once fell from their eyes which had so long prevented them from perceiving the emptiness of O'Connell's "moral force" philippics. They saw, and wondered they had not sooner seen, that though fear, being a metaphysical attribute of mind, may be called a "moral force,"—that though the fear of a punch on the head may, in relation to the actual practical punch itself, be called a "moral force,"—still it cannot be so termed in the same sense as fear of argument or ridicule may be called a "moral force." They saw that a force must be "physical" or "moral," not according to the nature of the object upon which it acts, but according to the nature of the object from which it proceeds; as we designate, not those salts which operate at Epsom, but those which come from it, Epsom Salts. They saw, therefore, that the so-called moral force of a million of men standing on one hill at the beck of one man, was in fact a physical force of the first order. They felt that their leader had raised and wielded this force by quackery; they felt that they could be quacks too, and thought they could be less transparent quacks, and they determined to set up for themselves.

"It is, however, one thing to eat dirt," says El Hadgi, "and another thing to eat dirt after this fashion." The new Hygeists of Ireland did indeed upset the old altar and the old priesthood; to erect such another was beyond their power. This part of the story is in the most ordinary course of party quarrels, but we follow with interest and compassion, which almost amounts to respect, the fallen High Priest of that idolatry. After a few fruitless efforts to stem the torrent—very few and very fruitless—a broken-hearted old man turns to seek that consolation from religion which he feels it would be vain to seek from the applause of friends or the hoarse murmurs of receding popularity. By sad and slow degrees he bears himself towards the earthly centre of that religion—to Rome. At each step of his progress, crowds follow and gaze upon him—but he sees them not. Nobles and leaders of the people address him—but he hears them not. They are strange voices, speaking strange things in a strange tongue. It is only of Ireland, the country of his birth and love and power—Ireland and Rome, his natural and spiritual country, that he can think. And Rome he shall never see. He shall indeed be brought down to look upon the bright blue

may die." O'Connell, however, had not so many contingencies in his favour. His Sultaun, the people, could not die, and from the care he took not to let Repeal, the ass in the apologue, expire, he deserves almost to be taken to represent that animal himself.

waters, and he shall hear that they alone separate him from the City of Souls—but that city of his hopes shall never hold him. Stay! his heart! Yes, living or dead, it shall have his heart.

And Ireland! After all he had borne for her, all he had toiled, all he had sinned for her; Ireland, that had cast him out at the last; Ireland, that his breaking heart loved better as it broke; for whom he had done so much, but so much less than he might have done; Ireland, gnawn by famine and pierced by frost, sits icebound amidst heaps of rotten food and putrefying corpses, awaiting the dart of pestilence. And then he sees the country whom he had taught his sons and her sons to hate and scoff at, and menace and deceive—he sees Saxon England opening her scanty store—for the famine and frost lay sore on her also—and relieve a suffering sister's wants; and after all his efforts to induce a separation, his last looks from the shores of the Mediterranean see Ireland "reposing as a child on the lap of England."¹

There has seldom been a political character who exhibits such remarkable differences as O'Connell. Viewed on the one side, he is more than a man; on the other, less than a coward. See him, from his first address to a public meeting, in 1800, down to the time when, contending in the first year of emancipation for the validity of the first election for Clare, he appeared to defy alone the whole House of Commons in his refusal to take the oaths. See him contending, in 1833, against the Coercion Bill, with an audacity that never hesitates, a hardness that never bends—defending every inch of ground as if it were the last he had to stand upon,—framing still new weapons for the contest of the morrow, as those of to-day are wrested from his grasp, his huge form swayed to and fro, and his features black with passion, his colossal voice denouncing eternal war, "that he never would yield—never, never, never!" It was a picture turgid perhaps in conception, false in colouring, inconsistent in detail; but the outline of the principal figures was magnificent, and the depth of shadow terrible. But contrast his conduct at the very same period of his life, in the government prosecution of 1831. Miserable, indeed, was the example he gave of unprincipled ambition and wounded vanity. His indignation on discovering that the verbal subterfuges and audacious misrepresentations which won applause and belief at Burgh Quay moved an assembly of English gentlemen merely to ridicule and contempt, was quite comic. His manner of appealing to a letter written by his own son, dictated by himself, delivered

¹ "Times," June 7, 1847.

by his son-in-law to two of his friends, and by them communicated to the Irish government, as containing the terms upon which he, Mr. O'Connell, then in prison, was willing to compromise the government prosecution of 1831, which the government, having already obtained judgment, of course refused even to listen to,—his manner of appealing to this letter, reading it in the open House of Commons, not denying but recapitulating and enforcing all the circumstances just mentioned, and then insisting that all this fully justified and established the asseverations he had made on the Corn Exchange, that not he, but the government had proposed a compromise, and that he, not the government, had rejected it : all this was in the first class of Irish farce ; and the conclusion of the first part of his speech, " Here, then, gentlemen, I stand triumphant," was received by peals of laughter on all sides of the house, which lasted several minutes.¹ Not less mortifying to human nature was the exhibition on the occasion of his threatened impeachment of Mr. Doherty, the Irish attorney-general, for his conduct in the prosecution of the famous Doneraile conspirators.² Willingly

¹ For a report of the whole speeches, see *Parl. Hist.* for the year 1831 Feb. 28.

² A special commission was issued for the trial of those accused of being engaged in this conspiracy on the 28th October, 1829, and the principal Crown officers went down to conduct it. It was wished to retain O'Connell for the defence ; but as some repose was deemed absolutely necessary after his political labours, and as he considered the accused amply defended by other counsel retained, he declined the brief, and retired to his seat at Darrynane, in the same district, but at some distance. But scarcely had he begun to taste the sweets of repose when an express which had travelled all night brought the news that the first trial had brought a verdict for the Crown, and that four men were condemned to death on what he at once saw was inadmissible evidence, and accordingly successfully resisted on the subsequent trials, to which he hastened through unremitting storms and across wretched roads. It was Sunday morning when the express reached him ; by travelling all night he arrived shortly after the commencement of the second trial. A murmur in the street, gradually swelling to a shout of triumph, announced the arrival of the " Counsellor," who took his seat within the bar, apologising to the court for his want of costume, and divided his attention between a large bowl of bread and milk, which was hastily handed up to him, the hurried narrative of the facts of the case before the court and the circumstances of the trial, which a junior counsel was pouring into his ear, and the opening speech which the attorney-general was making to the jury. Suddenly, " *That's not law !*" cried O'Connell to some statement of the attorney's ; and the court ruled against Mr. Doherty, who, irritated at this first failure, exposed himself more and more often to the attacks of his unexpected and most unwelcome antagonist, who, in the fulness of his triumph and elation of victory, not only out-argued him, but indulged in coarse and insulting personalities, actually holding him up to the derision of the jury as " long Jack Doherty from Borrisokane." The rest were " long to tell ;" suffice it to say that O'Connell procured an acquittal of some who were accused, on precisely the same evidence

would O'Connell have suffered the whole story of the impeachment to die a natural death in silence, but his opponent had been too severely attacked to permit his disgraceful retreat unnoticed. Night after night he tauntingly inquired why the honourable member for Waterford did not commence the proceedings? Night after night witnessed the ridiculous evasions of O'Connell—evasions immediately seized and held up to grinning "scorn and infamy" by his merciless antagonist. "I curiously watch," said the attorney-general—and so did the nation—"every stone which the honourable and learned member brings to the formation of the bridge over which he is preparing to run away." Well might an impartial observer, who had been carried away in the first instances by O'Connell's vehemence and enthusiasm, exclaim with Trinculo, as he perceived the meanness and falsehood of the demagogue—

"What a thrice double ass
Was I to take this coward for my god,
And worship this dull fool!"

Such are some of the more prominent traits in the character of O'Connell, the emancipator and the repealer, the crafty lawyer and the enthusiastic devotee. Since the days of Cromwell, no subject of the British crown has seemed so nearly to usurp an independent power within these realms as he, and yet no two ambitious statesmen ever differed more. O'Connell possessed no more of Cromwell's iron will and stern resolve than Cromwell had, at least in the days of his power, of that religious, devotional spirit which never quitted O'Connell to the last moment of his life. And as to the lighter powers of the mind, the most humorous joke of Cromwell's that has been handed down to posterity was his smearing the rich satin dresses of his court ladies with raspberry jam. Neither had Cromwell the *copia fandi* which so highly distinguished O'Connell; yet in his youth Cromwell was, like the Irish emancipator, a fanatic in religion and an enthusiast in politics; and in the beginning and close of their lives, these extraordinary men resemble each other more than in any other part of their career. The victo-

as that on which the first tried had been condemned to death. On this the prosecutions were abandoned, and the punishment of those who had been convicted was commuted to transportation. See the whole story very fully and graphically told in "Ireland and its Rulers," vol. iii. After all, it is utterly uncertain, and we suppose will always be so, whether the celebrated Doneraile conspiracy ever had any foundation whatever in point of fact, or was not entirely got up for party purposes. Irish witnesses are such liars! O'Connell said, and swore that he would impeach the attorney-general for his conduct on the first trial, on which the conviction took place. The whole thing ended in smoke, as stated in the text.

rious soldier, indeed, who in his corslet and buff boots had "trod his way through slaughter to a throne," had deeds of violence and crime to repent, from which O'Connell's forensic career and his mind, almost to timidity averse to bloodshed, had happily preserved him. Darker shadows brooded on the soul of that stern regicide than any which haunted or could haunt O'Connell. But the anxious contemplation of great powers possibly misapplied, and of great opportunities neglected—of "talents folded in the napkin,"—thoughts such as these seem to have been hovering around the minds of both; at least we see traces of this anxiety in the answer given by Cromwell to his ghostly advisers, who assured him, according to the Calvinistic doctrine, that the man who once stands well can never afterwards fall: "Then," cried Cromwell, "then am I safe, for sure I am I was justified once." And how many of us are there, to whom, like Cromwell, the retrospect which the close of life affords glows brighter and purer in the distant period of our youth than in these later days, in which we have been walking round about among our graves?

B.

[This article was to have appeared in the last number, but was prevented by the sudden illness of the contributor.—ED.]

Notes of Leading Cases.

COMMON LAW.

EQUITY JURISDICTION OF THE EXCHEQUER IN MATTERS OF REVENUE.

Attorney-General v. Halling and others, 15 M. & W. p. 687.

THE judgment in this case presents features of peculiar interest, from the authoritative and condensed historical sketch which it contains of the jurisdiction of the Court of Exchequer from a remote period to the present time.

By the 5 Vict. c. 5, as is well known, the equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, but whether the equity jurisdiction of the Exchequer as a court of revenue was at the same time abolished has been a question very open to discussion. This depended upon the construction to be put upon the first section of the above statute. Its interpretation was before Lord Langdale in the *Attorney-General v. Corporation of London*, 14 Law Journ. N. S. Chan. 305, and according to his opinion, all equity jurisdiction of the Exchequer, even in matters of revenue, is taken away. But in the case now before us, the Court of Exchequer was called upon to pronounce solemnly upon its own functions, and came to the opposite conclusion. Before considering the statute itself, it is pertinent to inquire what was the state of the court's jurisdiction before it passed. "The exact state of this court, at the time when the 5 Vict. c. 5, was passed, was, that in the Court of Exchequer there was a court of revenue, held before the Treasurer, the Chancellor of the Exchequer, and the Barons, exercising, for the due collection of the revenue, a procedure after the forms of a court of equity, and a court of revenue held before the barons, exercising the forms of procedure proper to the other courts of common law, both, however, having certain peculiarities familiarly known by the term '*cursus scaccarii*,' and that, annexed to and as a part of this general revenue court, there were incidentally courts of equity and of common law for its officers and the real crown debtors: and that, further, an ancient, though originally usurped jurisdiction, was exercised by it as an ordinary court of equity between subject and sub-

ject; and that by statute (abolishing a similarly usurped jurisdiction at common law between subject and subject) there existed a court of common law, which, like the other superior courts of common law, exercised incidentally certain equitable powers of interpleader and the like, some of which had been previously conferred upon all those courts by various statutes, and others had been by common law exercised as parts of their practice from time immemorial." It is therefore evident upon an analysis of its jurisdictions, that the Court of Exchequer *possessed* an ununsurped and original power in all matters of revenue (to which we confine our remark), exercised by a twofold mode of procedure, viz. according to the forms of common law before the barons only, and according to the forms of equity before other high officers with the barons; and that acting in either of these two ways, it acted equally within its character, and according to its pristine constitution as a court of revenue.

Now the words of the act are, "that all the power, authority, and jurisdiction of the Court of Exchequer, as a court of equity, and all the power, authority, and jurisdiction conferred on or committed to the said court by or under the special authority of any act or acts of parliament, other than such power, authority, and jurisdiction as shall be then *possessed by, or be incident to*, the Court of Exchequer as a court of law, or as shall then *be possessed* by the said Court of Exchequer as a court of revenue, and not heretofore exercised or exerciseable by the same court as a court of equity," shall be transferred to the Court of Chancery. The second exception, it will be observed, is of all powers possessed by it as a court of revenue, but then it is added "not heretofore exercised or exerciseable by the same court as a court of equity." Upon the meaning of these words the question turns, and they are thus explained: "Now, when we find that the Court of Exchequer had used its forms of equitable procedure from time immemorial, not merely for the collection of the revenue, its proper duty, but also as a court of equity for its officers and crown debtors in their ordinary affairs, and further, by a suggestion not allowed to be traversed, for all the subjects of the realm, we think the only correct meaning of the whole reservation is, that the legislature take from the court of revenue this incidental jurisdiction, which it exercised as a mere court of equity, and confine its jurisdiction in future to the mere collection of the revenue of the crown, but with all the powers which, from time immemorial, it has exercised for that particular purpose."

In confirmation of this, which would seem to be the fair literal construction of the words of the act, are to be found other not

unimportant considerations, such as,—the retention of the Chancellor of the Exchequer at the head of the court, whereas it is only when in the exercise of an equitable jurisdiction as a court of revenue that he has been entitled to take his seat; the necessity of equitable powers for the just collection of the revenue and in ease of the subject; and lastly, the extreme unfittingness that the crown should be forced to resort to two courts, from being unable to obtain full justice in one, as would ensue, were the crown obliged first to go into a court of equity for a discovery before suing in the Court of Exchequer for redress.

As far as the deliberate opinion of the barons themselves may be considered conclusive, the result of the section above stated therefore is, that the court, though deprived of its former equity jurisdiction, in other respects retains still all its actual and incidental jurisdiction, equitable as well as legal, which it has as a court of common law, and further retains (what is more to our present purpose) all its proper jurisdiction as a court of revenue, for the collection of the revenues of the crown, whether the latter jurisdiction be exercised after the forms of common law or equity.

LIMITATION ACT—OPERATION OF, AS TO TITHES.

Dean and Chapter of Ely v. Cash, 15 M. & W. 617.

IN this case a highly important question was referred from the Court of Chancery to the judges of the Exchequer for their decision. It turned upon the construction to be put upon the Limitation Act, 3 & 4 Will. IV. c. 29, as applicable to tithes. The first section of that act interprets the word "*land*" to include tithes. The second section, upon which the point arose, enacts that no person shall make any entry or distress or bring an action to recover any *land* or *rent* but within twenty years next after the times at which the right to make such entry or distress, or to bring such action, first accrued to him, or to some person through whom he claims. In *Grant v. Ellis*, 13 M. & W. 113, it was decided that the word "*rent*" in this section applied to an estate in rent and not to rents reserved on a demise, so that the nonreceipt of rent under a lease for more than twenty years did not bar the landlord of his right to rent under the lease.

In the *Dean and Chapter of Ely v. Cash* the right and title of the plaintiffs to the tithes in question did not accrue within

twenty years before the suit, nor were they in receipt or possession of the profits of the tithes at any time within that period. The defendant occupied the land out of which the titheable matters arose at the time the suit was commenced and for three years previous; during such occupation he had neither set out or paid tithes, but had yearly retained to himself the titheable produce. There was no acknowledgment in writing with respect to the tithes. The question was, whether the plaintiff's title, which was to be taken to be otherwise good, was, under these circumstances, barred by the Limitation Act,—in other words, as the question was asked of the Court of Exchequer, whether the plaintiffs would notwithstanding that act be entitled to recover against the defendant treble the value of the tithes in an action for not setting them out. The court, on the authority of *Grant v. Ellis*, gave their opinion in favour of the plaintiffs. The distinction taken in that case becomes still finer when applied here, viz. between an estate in the tithes, and the tithes themselves as chattels the fruits of that estate. The former, it was considered, might properly be included in the word "land," which the statute interprets to include tithes,—but not so the tithes themselves as chattels. Where, therefore, tithes are paid to an adverse claimant, as the estate in the tithes is in question, such a payment affects the title under the statute, but where they are not set out or paid to another, as was the case here, the tithes as chattels are alone in question, and such a case it was held is not within the operation of the act. Another reason which disposed the court to put this interpretation upon the statute was, that it is thereby made consistent with Lord Tenterden's Act (which it does not affect to repeal), under which a defendant must show a period of sixty years and three incumbrances who relies upon nonpayment as a ground of exemption from tithes.

NUISANCE—LANDLORD AND TENANT.

Rich v. Basterfield, 11 Jurist, 696.

THAT a man may be liable to an action for nuisance for an injury done on his property by persons not strictly his agents or servants is recognized law. We find the principle expounded by Mr. J. Littledale in *Laughter v. Pointer*, 5 B. & Cr. 552, and acquiesced in by the Court of Exchequer in *Quarman v. Burnet*, 6 M. & W. 499. The rule upon this subject is, that where a man is in possession of fixed property, he must take care that his property is so used or managed that other persons are not injured; and that, whether his property be managed by his own

immediate servants, or contractors with them, or their servants. It is equally clear, that if a person leases his property, free from nuisance, and the tenant creates one upon it, the landlord is not liable. There are, however, cases which show that a landlord may be liable to an action for nuisance where the premises are in possession of a tenant. *Rosewell v. Prior*, 2 Salk. 460, decided that if a tenant for a term of years erect a building which is a nuisance to his neighbours, and afterwards underlets, he is liable to be sued for a continuance of the nuisance during the occupation of his tenant. But the case of *R. v. Pedley*, 1 Ad. & E. 822, went still further, and would seem to indicate that if the owner of land erect a building of which the occupation is likely to prove a nuisance, or of a nature to require particular care to prevent the occupation from becoming a nuisance, and leases, and the nuisance afterwards occurs from want of care or otherwise on the part of the tenant, the landlord is responsible.

Now in the case of *Rich v. Basterfield*, this extension of the rule of the landlord's liability is denied to be law by the Common Pleas in a judgment, remarkable for its learning and accurate criticism of cases, delivered by Mr. J. Cresswell, under circumstances closely resembling those of *R. v. Pedley*. The defendant had erected two low buildings with a chimney and stove, and let them from week to week. The former occupier used to make a fire in the stove principally of coke, and then no smoke which could be perceptible issued from the chimney, but the present occupier caused a good deal of smoke to issue, so as to oblige the plaintiff to keep the windows of his house, which adjoined, shut. It was not contended that the erection of the chimney was in itself a nuisance, but the case against the defendant rested upon the subsequent use made of it by the tenant. It was held that this afforded no cause of action against the present defendant, and that the class of cases to which we alluded at the outset, where the owner of land is made liable for the acts done upon it of another not strictly his agent, did not apply here, because such liability attaches only to persons in possession, which the defendant was not. The decision further proceeds upon the general ground, that if a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, though the landlord receive some profits after they are so used, yet the landlord cannot be held responsible for the acts of the tenant.

The case of *R. v. Pedley*, which seems to combat this position, is minutely investigated by the court, and it is observed with

respect to it, that if it is to be considered as a case in which a landlord is to be held liable because he had demised the buildings on which the nuisance existed, or because he had relet them after the buildings had created the nuisance, and because he had undertaken the cleansing and had not performed it, they thought the judgment right, and it did not militate against their present position; but that if it is to be taken as a decision that a landlord is responsible for the acts of his tenant, in creating a nuisance, they thought it went beyond any principle laid down in any previously decided cases, and did not merit their assent.

WHAT CONSTITUTES A SURRENDER BY LAW.

Nichols v. Atherstone, 11 Jurist, 778.

THE doctrine of surrender by operation of law was, as will be remembered, very elaborately gone into in a learned judgment of the Court of Exchequer, in the case of *Lyon v. Reed*, 13 M. & W. 285. Not so much the decision itself as some remarks it contains threw a doubt upon the question, whether the class of cases there alluded to, of which *Thomas v. Cook*, 2 Barn. & Ald. 119, is the first, in truth, authorized the position which they had been usually relied upon as establishing, viz. where by the consent of all parties a new tenant is substituted, and such substituted tenant occupies, this amounts to a valid surrender in law of the interest of the first lessee. In a note upon *Lyon v. Reed*, in an earlier volume,¹ we ventured to predict that since that decision the accuracy of the above proposition was likely to be called in question. This occurred in the case before us; but the Court of Queen's Bench have now dispersed all doubt, by deciding that such facts do constitute a surrender by operation of law. Extracting from the judgment in *Lyon v. Reed* what are there stated to be the essential characteristics of a surrender by law, the Court of Queen's Bench proceed to show that such, if requisite, are found in the facts of the present case. The court express their full acquiescence in the decision of *Lyon v. Reed*, where the point was as to the surrender of a reversion, and where no change of possession of the reversion could be made apparent, but claim to dissent from the comments of the Court of Exchequer upon the class of cases above alluded to, and which comments had given rise to the argument in the present case.

¹ Law Mag. vol. iii. N. S. p. 140.

Now therefore it is certain, at least in the case of demises in possession, that the consent of all parties to a new and substituted tenancy, accompanied with a change of possession, will operate as a surrender in law of the lease of the first tenant.

PRACTICE.

EXECUTION AGAINST MARRIED WOMEN.

Newton v. Boodle, Newton v. Rowe and Norman, 11 Jurist, Q. B. 628.

THIS was a decision upon the liability of a married woman to be taken in execution. The action was brought by husband and wife, for knowingly and maliciously suing out and prosecuting against the wife a writ of *capias ad satisfaciendum*, the writ having been issued upon a judgment for the defendant for his costs, in a previous action of libel brought against him by the husband, in which the wife was joined. Here the question was, not whether the court would interfere to discharge the wife, but whether it was legal to have taken her at all. It was contended, on behalf of the plaintiffs, that the writ of *ca. sa.* ought not to have included the wife. It was urged that in the case of a judgment against a man and his wife, *defendants*, a valid writ of *ca. sa.* may issue against *both*; this rule obtained, because a wife was not joined as *defendant*, except where the cause of action was in respect of her own personal interference or misconduct,—the cases favouring the inference that it is only where she is the party in fault that such a writ is allowed, as if in an action for an assault, the assault were committed by her; but where husband and wife were *plaintiffs*, and judgment is given for the defendant, inasmuch as the wife has no control over the action, and the profits of it would belong to the husband, it was said to be unauthorized, and unjust towards the wife, to make her liable to be arrested for the defendant's costs. A passage from 3 Blackstone's Comment. p. 414, was much relied upon as showing that there are cases in which, at common law, though the judgment is against husband and wife, the husband alone is the party against whom execution ought to issue. Moreover, it was contended, that if this were so at common law, so a fair and equitable construction of the statute 23 Henry VII. c. 5, would lead to the same result. That statute (sect. 1) enacts that in the case of a nonsuit or verdict against the plaintiff, the defendant shall have judgment to recover his costs against the plaintiff, and shall have such process

and execution for the recovery of the same against the plaintiff as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff. Hitherto there was no decision upon this statute, in which the liability of a married woman, joined with her husband as *plaintiff*, to the process conferred by it, had been discussed; and it was argued that as the wife could not at common law be taken upon a *capiatur pro falso clamore*, therefore under the statute which substituted the liability to costs for the common law *amerceiment, pro falso clamore*, she ought not to be taken. But the court were unanimously of opinion that the writ of execution must in this as in other cases pursue the judgment, and therefore properly issued against husband and wife; they said that it is clear at common law this was a good writ against husband and wife defendants; and next, it is equally clear that the statute makes the liability of plaintiffs correlative and co-extensive to that of defendants. The case cited and adopted in the text by Mr. J. Blackstone is observed upon by the court as applying only to the writ of *capiatur pro fine*, and even as to that, as being directly opposed to other early authorities, which he has omitted to cite. Denman, C. J. says, "Upon the whole the books recognize the right to arrest the wife, and that appears in some cases cited to prove the contrary; for instance, why should she be bailed if there is no power to arrest her on *mesne process*? The arrest is throughout treated as legal, though under various circumstances the court will interfere, and save the wife from the inconveniences which would arise from it." The absence of all precedent for such an action as the present is added, as in itself a strong authority against the plaintiffs. And next with regard to the statute, it is said, "The words of the statute do not bear out the argument; they are quite general. If the cause of action survives to the wife in case of the death of her husband, there is no reason why she should not be taken for the costs, if the action fails. It is true, that if the action succeeded, the husband would take the money levied upon the judgment, as he would any other property of the wife; but if he dies, the action survives to the wife, and therefore she is interested in it."

A wife, therefore, joined with her husband either as plaintiff or defendant, is no more exempt from process in execution than the husband himself; her only remedy is by application for discharge, an indulgence which hitherto has not been refused to her upon a joint execution (*Hoad and wife v. Matthews*, 2 Dow. P. C. 149), where the court or judge applied to are satisfied she has no separate property.

PLEADING.**NE UNQUES ADMINISTRATOR—HOW SUCH A PLEA SHOULD CONCLUDE.**

Scott v. Wedlake (in Error), 7 Q. B. 766.

IN this case was decided a technical but still important point of pleading,—viz. as to the proper form of conclusion to a plea of ne unques administrator. The defendant was sued in assumpsit as administratrix with the will annexed, upon promises by the testator. She pleaded that she is not nor ever hath been administratrix in manner and form as the plaintiff has alleged, and concluded with a verification. For this conclusion the plea was demurred to. Judgment was given for the defendant in the Queen's Bench, upon which the plaintiff brought error in the Exchequer Chamber. The question was argued at length. That the verification is a proper form of conclusion to pleas of ne unques executor the oldest authorities show, Co. Ent. 144 b; Rast. Ent. 322 a, 330 b; Winch. Ent. 344; this was not now disputed, but a distinction was taken by the plaintiff. It was said the plea of ne unques executor introduced new matter in the averment *nor ever administered*, intended to exclude the supposition that the defendant was executor de son tort, and so such a plea denied more than the declaration alleged, and therefore properly concluded to the court; whereas as no necessity existed for excluding such a supposition in the case of an administrator, because a person cannot be sued as administrator de son tort, for which was cited 2 Chit. Plead. 2d ed. 808, n. a; so the plea of ne unques administrator contained no such averment; it did therefore no more than deny the allegation in the declaration, and consequently ought to have concluded to the country. The court took a different view and gave judgment for the defendant. They said the statute the 31 Edw. I. c. 11, which enables persons to sue or be sued as administrator, does not prescribe the form, but enables them to sue "as executors," and makes them liable to be sued "in the same manner as executors," the intention and spirit of the act being, that no unnecessary difference should exist between executors and administrators. Practice and decisions had established that a conclusion to the court was proper in the case of executors; the reason it was difficult to discover, probably with a view to lead to a narrower issue, by leaving it open to the plaintiff in his replication to show in what manner he sought to charge the defendant, which

reason then equally existed in the case of a defendant charged as administrator, as the plaintiff might reply, not by repeating his general allegation, but by showing a particular grant of administration. But as to the reason suggested by the plaintiff, and insisted on as showing a distinction between the pleas of *ne unques executor* and *ne unques administrator*, it did not appear to the court to be well founded. "A declaration against an executor does indeed describe him as the executor of the last will and testament, but this is because there is no other form of writ or count, and every executor of his own wrong is so named, *Coulter's case*.¹ The plea, therefore, which in denying that the defendant is executor of the last will, or ever administered as executor, does no more than deny that he is executor, either by right or by wrong; does no more than deny what the allegation in the declaration, that the defendant is executor of the last will, is to be understood as importing." Therefore it was determined that as such a plea was not introductory of new matter, in the case of an executor, it was not distinguishable from the present plea; and that as there was no reason for making any difference, the same rule which is clear in the case of an executor must apply here, and the defendant was at liberty to plead by concluding to the court in the manner she had done.

PAYMENT OF MONEY INTO COURT.

Tattersall v. Parkinson, 16 Law Jour. N. S. 196.

THE best mode of pleading payment before action brought, or payment into court as to part, to a declaration containing several counts, is frequently a matter of very difficult determination amongst pleaders, especially where there is more than one count in the declaration applicable to that portion of the demand which is sought to be covered by the plea. At one time it was decided in the Queen's Bench (*Mee v. Tomlinson*, 4 Ad. & El. 262), on an occasion when Mr. J. Patteson presided, that upon a plea of payment in accord and satisfaction as to a portion of two or more counts, it was necessary for the plea to show how much of the sum was paid upon each count. But the case of *Jourdain v. Johnson*, 2 C. M. & R., which was unknown to Mr. J. Patteson at the time, laid down a contrary rule as to a plea of payment into court; and there have been other cases since, in which Mr. J. Patteson himself has coincided, where his former decision has been treated as incorrect. Now, therefore, there is no doubt but that a plea of payment into court,

¹ 5 Rep. 30 a.

and probably also a plea of payment in accord and satisfaction, may, generally speaking, be made as to several or part of several counts without stating how much is paid upon each.

The rule that payment of a smaller sum cannot be pleaded *as an accord and satisfaction* of a larger, is also of importance to be remembered, and requires to be observed, even though the plea is in answer to a general declaration in *indebitatus assumpsit*, where it might be considered the plaintiff had stated only general sums. See *Down v. Hatcher*, 10 Ad. & E. 121.

In *Tattersall v. Parkinson* this rule, that the sum pleaded in payment must not be less than the whole sum admitted to be due, was held to be likewise applicable to *pleas of payment into court*, and received in this respect a new and twofold illustration. The first count of the declaration was upon a bill of exchange for 26*l.* 13*s.* 2*d.*; the second was an *indebitatus* count for 30*l.* for money lent and on an account stated. The defendant pleaded several pleas, and lastly as to 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.* parcel of the last count, (excepted from the former pleas), payment into court of 11*l.* in the form given by R. G. T. 1 Vict., concluding "that the plaintiff has not sustained damages to a greater amount than the said sum of 11*l.* in respect of the cause of action in the introductory part of this plea mentioned." To this plea there was a special demurrer. The judgment of the court was delivered by Parke, B., and the plea pronounced to be bad upon two grounds. Firstly, it was decided to be bad because pleaded to a count upon a bill of exchange for an amount larger than the sum paid in. "Where one of the counts is on a bill of exchange, the difficulty arises which was pointed out in that case of *Jourdain v. Johnson*, but not decided, viz. that if less than the amount of the bill of exchange should be considered as paid in on that count, the plea would be bad; for if it admitted the bill, it admitted *prima facie* the precise sum to be due on it, and less than that would not legally satisfy it; or if it should be considered in the nature of a plea of non-assumpsit to the remainder, the new rules forbid such a plea, and the record would contain no proper answer to the residue, unless there was an allegation of some special ground of defence, as part payment or failure of consideration as to part; and we do not see how this objection can be properly surmounted if this demurrer properly raises it, and we think it does." Therefore it would appear that a plea of payment as to part of an amount of a bill of exchange is in no case good, unless such plea contain a defence as to the rest of the amount. The other ground upon which this plea was held defective has reference to the other count to which the plea is in part pleaded.

Deducting from the sum paid into court 10*l.* 9*s.* 1*d.*, as applicable to the first count, it is seen the sum of 10*s.* 11*d.* only remains as applicable to the last. Now a count in indebitatus assumpsit must be construed to claim a sum as due on one or more *liquidated* or unliquidated contracts. The plea admits a certain sum to be due upon such a count. But if the sum admitted is liquidated, or an aggregate of liquidated contracts, the plaintiff cannot have sustained less damage than the liquidated demand for that sum. Therefore on this second and independent ground it was decided that the form adopted in this case of pleading payment of a less sum of money into court than the sum pleaded to in an indebitatus count, with no answer to the difference except that no more damages have been sustained, is objectionable; and the court intimated that the practice of pleading the payment of money into court to so much of the declaration as is equal to the amount paid in, is the best form that can be adopted.

NONJOINER.

Joll v. Lord Curzon, 11 Jurist, C. B. 737.

GODSON v. Good, 6 Taunt. 95, is the case generally cited to show that upon a plea in abatement by the defendant for the nonjoinder of his co-contractors, the plea must name them all, and that if it omit any one of them the issue will be found for the plaintiff. The rule thus laid down has never been questioned. The reason of it is that a plea in abatement must give the plaintiff a better writ; which a plea that does not name all fails to do, as it leaves the plaintiff to the risk of being met in a second action by another plea in abatement as to those not before named. Therefore to give a better writ implies a writ against all the co-contractors. But stat. 3 & 4 Will. IV. c. 42, s. 8, has imposed certain restrictions upon the right of a defendant to plead in abatement. It enacts that no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

In the case of Joll v. Lord Curzon the defendant pleaded in abatement, that the promise was made with certain other persons, naming them, and alleging that they were resident within the

jurisdiction of the court, and also with nine other persons, of whom it was alleged they were beyond and out of such jurisdiction. Upon demurrer to this plea the question was, whether the statute had not under these circumstances in effect deprived the defendant of his plea in abatement. Here, we see the names of all the co-contractors are stated as required before the statute, whilst certain of them are out of regard to that enactment stated to be within the jurisdiction. But it was objected that this plea since the statute did not fulfil the inherent condition of a plea in abatement by giving the plaintiff a better writ, and was therefore bad: and of this opinion were the court. It is pointed out that the statute was never intended to vary the rules of pleading upon this subject. *Wilde C. J.*: "The statute was intended to relieve the plaintiff from the dilatory and expensive process of proceeding to outlawry against those of the co-contractors mentioned in the plea, and who were abroad, but was not intended to work any other alteration. For this purpose the statute requires that the defendant shall aver that all the co-contractors whom he seeks to make parties are within the jurisdiction; if he cannot do this, then he is not in a situation to avail himself of this plea. The plea in abatement ought to give the plaintiff a good writ against all the co-contractors; this plea does not, but gives an excuse for not doing so; inasmuch, therefore, as it does not show that the plaintiff has the power of suing all, the condition fails, and the plea cannot be supported."

It follows from this decision that if the defendant cannot give the residence of all his co-contractors, he is in such case also by the terms of the statute deprived of his plea in abatement upon precisely similar grounds.

PLEA TO THE JURISDICTION—SOVEREIGN PRINCE.

Munden v. Duke of Brunswick, 16 Law Jour. Q. B. 300.

THIS was an action of debt upon a deed granting an annuity to the plaintiff brought against the Duke of Brunswick. Defendant pleaded that the court ought not to take cognizance of the action, because at the time of making the deed he was a sovereign prince and made it in his own dominions, and that he still was entitled to the rights, privileges, and prerogatives which belonged to him in that character. Replication that the deed was not a matter or act of state, but a private debt, and that before the accruing of the cause of action, defendant had quitted his dominions and

come to reside in this country as a private individual. To this there was a demurrer assigning several causes. The court, after taking time to consider, gave judgment for the plaintiff upon the insufficiency of the plea. As a plea to the jurisdiction it was held to be defective, for omitting to state that the defendant was a sovereign at the time of commencing the suit, or of plea pleaded; whilst the statement, he was justly entitled to the privileges and prerogatives belonging to that character,—an opinion formed by himself and very easily erroneous,—was held by no means to supply the want of such an allegation. Upon the question of the amenability of a sovereign prince for an act done by him in his own dominions, the following interesting remarks are thrown out by the court. “If indeed being a sovereign prince *de facto*, he had in that character made such a contract with the plaintiff, and so had not bound himself as an individual, that might, perhaps, constitute a good defence to the action, not a good plea to the jurisdiction. But sovereign princes may contract obligations in their private capacity upon obligations purely personal. Whether by the laws of their own country, these might be enforced, we have no means of knowing: there is no presumption either way, neither is there any presumption that this contract is an act of state; the contrary would be more naturally inferred from the nature of it. Without an averment to that effect, the plea tells us nothing but that the defendant, when for a good consideration he entered into a contract, was a sovereign prince. This is clearly insufficient.”

Short Notes of New Books.

Precedents in Pleading; with copious Notes on Pleading, Practice, and Evidence. By the late Joseph Chitty, jun., Esq. The second edition, containing References to all the Cases decided upon the New Rules of Pleading, and short Preliminary Observations on the more important subjects. By Henry Pearson, Esq. of the Middle Temple, Barrister at Law. In two Parts, Part II. London: W. Benning & Co. 1847.

By the publication of the second part of this work, the profession have before them the most valuable and most complete Collection of Precedents in Pleading extant. Nor is it a mere collection of precedents; the copious notes scattered throughout the volume, and the preliminary observations which are prefixed to the more important subjects, supply a store of most valuable information upon Practice, Pleading, and Evidence. Of the general contents of the work, it is unnecessary to speak; as the profession is already familiar with them, but with the manner in which the editor has performed his task, it becomes us to say one word. It will be remembered that in a former number we noticed at some length the first part of the Precedents, and in doing so it became our duty as we then thought, and still do think, to pass some strictures upon what to us appeared the somewhat ungenerous tone of the editor's preface. We also pointed out, as we were bound to do, some few errors which the learned editor had inadvertently fallen into, and which we are glad to see he has had the care to correct in the addenda to the now completed volume. So far, we rest satisfied with what we have done, and hope and believe that neither Mr. Pearson nor the profession can charge us with injustice. Be that as it may, we must repudiate all intention of speaking in slighting terms of the manner in which the work has been executed; indeed, so far from it, we express our sincere conviction when we say, that the profession is indebted to Mr. Pearson for the care and ability with which he has upon the whole performed his difficult task, notwithstanding the defects we have already pointed out.

We cannot conclude these remarks without thanking Mr. Pearson for the valuable collection of modern authorities which have been gathered together in this new edition of the Precedents in Pleading, and for the careful and elaborate index which concludes the whole volume.

A Treatise on the Law of Leases, with Forms and Precedents. By Thomas Platt, Esq., of Lincoln's Inn, Barrister at Law, Author of "A Practical Treatise on the Law of Covenants." In two volumes. London: Maxwell and Son. 1847.

MR. PLATT has done much service to the craft of conveyancing by this large and important work, in which he has gathered together and presented a body of law, which must have cost him manifold pains, with no less discretion than ability.

The Precedents, with which the work concludes, are drawn with more regard to the merits of brevity, than conveyancers have hitherto evinced. But how difficult it is to convince ourselves, after long contrary usage of the fact so truly stated by Stephen, that "a terse style of allegation, involving a strict retrenchment of unnecessary words, ought to be the aim of practitioners, and is considered as indicative of the best school."

We think Mr. Platt justly entitled to an ample share of "the secret reward in the consciousness of an attempt to be useful," which he modestly anticipates from his labours. He may assure himself that his "attempt" has been more than successful.

The subject matters treated of are thus enumerated in the preface:

"In attempting to explain the law connected with the subject of these volumes, I shall, after noticing, first, the definition and general nature of a lease; and briefly adverting to, secondly, the different properties of a devisable nature; proceed to consider in order, thirdly, the contracting parties, and the nature of their contract: showing herein the distinction between an actual lease, and an agreement only for a lease; fourthly, the term of the lease; fifthly, the instrument of demise; its essential and formal parts; sixthly, the duration of the liability of the parties under their covenants; and the effect of the transmission by act of law, or alienation by act of the party, of the reversion, or the lease; seventhly, the determination of the lease, as well before its regular expiration as by effluxion of time; and after, eighthly, offering a few remarks respecting the preparation, custody, stamping, and registration of leases, and also respecting indorsements; finally, add a variety of forms and precedents, which may be referred to as practical illustrations of the law contained in the body of the work, and be rendered available by the draftsman to facilitate the dispatch of actual business."

Mr. Platt seems to possess great facility in lucid style, and in clearly explaining what he means. This is a great virtue not always attained even by eminent writers. Take as an instance his remarks on leases at will:

"Leases at will may be created by express terms, or may arise by construction or implication of law. In modern practice, the former are comparatively unknown, and with respect to the latter, the law has undergone considerable change. Formerly, all leases for uncertain periods, unaccompanied by livery of seisin, were held to constitute tenancies at will merely. If a termor granted the land generally, the grantee was but tenant at will; as it did not appear that the grantor meant to pass his whole interest, an estate at will was held to satisfy the grant. So, a demise for such term as both pleased, created but an estate at will, the term being altogether uncertain.

"But though leases for uncertain terms, unaccompanied by livery, still confer

prima facie but estates at will, the judges, since the days of Croke, have evinced a disposition to construe tenancies of this description into tenancies from year to year, particularly if an annual rent be reserved. The reservation of an annual rent is indeed one principal criterion of distinction between tenancies from year to year and tenancies at will.

"And, in the absence of more direct evidence of the actual periods of reservation, payment and acceptance of the rent at particular times of the year are equivalent on an actual reservation on those days, and admissible to prove the nature of the tenancy. Acknowledgment of the existence of an arrear of half a year's rent is admissible for the same purpose.

"Yet, notwithstanding this disposition, tenancies at will are not wholly unknown, and the remark ascribed to Mr. Justice Wilmot that 'in the country leases at will, in the strict legal notion of a lease at will, being found extremely inconvenient, exist only notionally, and were succeeded by another species of contract which was less inconvenient,' if indeed it was ever made, must, it is apprehended, be understood to signify that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them. Sir W. Blackstone's Report of Mr. Justice Wilmot's observation differs from Burrows; he is there stated to have said 'that tenancy from year to year had almost extinguished tenancy at will, which was a most unreasonable and inconvenient tenure to both parties.'"

This book consists of two large volumes, and is amply entitled to rank as a standard work on the useful and important subject of which it treats.

Commentaries on the Constitutional Law of England. By George Bowyer, D.C.L., Barrister at Law. Second Edition. London: Stevens and Norton. 1846.

THIS work is already well-known to the profession and to a considerable part of the non-professional public; its contents would afford a very instructive study. The principles of our law and constitution are laid down with great clearness in a plain unpretending style. Dr. Bowyer is far from being an irreflective historian, and his criticisms are not only useful provocatives of thought, but are often very judicious comments on matters which may some day form prominent subjects of discussion. For instance, he thus speaks of trial by jury:—

"Such is that celebrated trial by jury, which has ever been looked upon as the glory of the English law and one of the chief bulwarks of the liberty of the subject. It must, however, be admitted that for the mere decision of any given question it has serious imperfections. Twelve men, taken at random from the sheriff's book, and, perhaps, of the most ordinary education if not grossly ignorant, or even a *special* jury of persons above the rank of the common freeholders (which is resorted to in matters of greater than usual consequence), cannot be so competent to decide a difficult question as a learned and experienced judge who has gone through an elaborate legal education and a long course of training in forensic or judicial business. And the frequent occurrence of absurd or grossly erroneous verdicts has sometimes even endangered that traditional veneration in which Englishmen hold trial by jury. It must also be confessed that the political advantages of this celebrated institution are more

visible in criminal than in civil proceedings. But, on the other hand, its effect is to relieve the judges from a portion of the judicial function, and thus it is not necessary that they should be so numerous as in countries where the decision of both law and fact is imposed upon the magistrates. The consequence is, that not only the small number of our judges adds greatly to their dignity and the estimation in which they are held, but the crown is enabled to allow them large salaries, whereby men of the highest eminence in the legal profession are obtained to fill judicial offices. Such men, of course, acquire influence over the jurors, who repose the greatest confidence in their ability and character, which enables them, in most cases, to prevent an incompetent jury from falling into any very gross absurdity or injustice. But, on the other hand, if ever it should be attempted by corrupt or tyrannical judges to overturn the laws of property or the civil rights of the subject, they would probably meet with an obstable insurmountable in the jurors—the commons of the judicial order. And we may conclude that this is one of those institutions whose defects are, indeed, easily discovered, though, on the whole, it is valuable and useful as a part of the system of the constitution, which, vesting the entire judicial authority in the crown, has at the same time distributed its exercise among the royal judges and the mass of the people. The latter, moreover, derive both honour and advantage from being trained in the practical administration of justice."

The work is well deserving of extensive perusal.

The Ecclesiastical Statutes at Large, extracted from the great body of the Statute Law and arranged under separate heads by James Thomas Law, M.A., late Special Commissary of the Diocese of Bath and Wells. In five Vols. London: W. Benning & Co., Fleet Street, and F. & J. Rivington, Waterloo Place. 1847.

THIS important work contains the only complete edition of ecclesiastical statutes in existence. It commences with Magna Charta and terminates with 9 & 10 Vict. c. 113, containing several hundred acts of parliament. The whole are arranged alphabetically, so that easy reference may be made to all the statutes on any subject. Marginal notes refer the reader to other statutes which bear on the subject of those given in the work. These references are carried down to 1846, and space is left for further notes of any subsequent statutes. The compiler thus speaks of the work in his preface:

"The statutes at large now fill no less than thirty-one quarto volumes of ample dimensions, and the bookseller's price for the edition by Messrs. Tomlins, Raithby and Simons is 87*l.* 9*s.* 6*d.* boards.

"When I held the office of special commissary in the diocese of Bath and Wells, I often experienced the difficulty of hunting for acts of parliament, and it then occurred to me that I might do some service to the clergy if I extracted the ecclesiastical matter from the general mass.

"This I attempted on one subject, viz, Church Building, and the work having been favourably received by the public, and a second edition called for, I have laboured to make the same plan general,—as the following pages testify.

"I wish that others more capable had undertaken the task, or that I had myself been able to devote more time and thought exclusively to it, but other duties and responsibilities, various and urgent, rendered that impossible.

"As it is, I shall be well satisfied, if this Digest in any way saves the time of the clergy, and brings more within their reach a knowledge of ecclesiastical statute law, as it affects their rights, their duties, and their property."

This work is certainly a most invaluable aid to ecclesiastical practice, and likewise to the clerical profession. It is handsomely and clearly printed.

A Treatise on the Law of Legacies, by the late R. S. Donnison Roper, Esq., Barrister-at-Law, of Gray's Inn, and by Henry Hopley White, Esq., Barrister-at-Law, of the Middle Temple. 4th edition. In two volumes. London: W. Benning & Co., Fleet Street. 1847.

THE merits of this standard work are too well appreciated to need comment.

It appears that the third edition of the "*Treatise on Legacies*," which was commenced by Mr. Roper, was published and completed by Mr. H. H. White, the present editor, nearly twenty years since. The law of legacies has been much affected in that period by the decisions of the judges; which alterations the editor has embodied into the work without changing its former purport or greatly enlarging its size. He has referred to nearly 1,300 new cases, and he has placed as Addenda the latest "available authorities."

The Editor had made and inserted a collection of the cases in the reports between 1828 and 1841, but since that period his own avocations and also the great increase of cases have been a grievous impediment to the termination of the present edition.

Mr. Alexander Gordon of the Chancery Bar has been during the last year making a collection of "the authorities since 1840," the selection of which is entirely at the discretion of the Editor, who has paid undeviating attention to this portion of the work. We must in justice to Mr. Gordon state that the value of the present edition is greatly owing to the industry and zeal he has manifested in the cause.

A Treatise on the Jurisdiction of the High Court of Admiralty of England. By Edwin Edwards, Esq., of Doctors' Commons. 1 Vol. London: W. Benning & Co., Fleet Street. 1847.

THIS book on Admiralty Jurisdiction has been published under the idea that some work treating solely of that subject might be valuable to the profession. It is asserted (but with no degree of disrespect to those who in *former* times commented on the same subject), that there is not now extant a work of "practical utility on Admiralty Jurisdiction."

Though the common law courts have in many cases "a jurisdic-

tion concurrent with the" Admiralty Court, yet in some instances the author thinks that the judgment of the latter might have procured a full remedy where that of the Common Law Courts would be inadequate and mischievous. There is clearly as much necessity for a work of this kind as when the jurisdiction was in a more unsettled state. This work is designed to illustrate the use of the Court and describe the limits of its jurisdiction. The author hopes that, though his competency does not equal his anxiety to attempt this labour, "the work may suggest information to some and that others may discover therein something wherewith to refresh their memories, and with this hope the book is left to the indulgent consideration of the public."

We think the author fully entitled to something more than this; he has given a pleasant addition to the history of jurisprudence and thrown light on the origin and uses of an antique and quiet branch of judicature little subject to the observation of the world and less known to few classes than to that professional body of which its advocates are members.

A Treatise on the Law of Fixtures and other Property, with an Appendix containing practical Rules and Directions respecting the Removal, Purchase and Valuation, &c., of Fixtures between Landlord and Tenant, by A. Amos, Esq., and J. Ferard, Esq., Barristers-at-Law. Second Edition, by J. Ferard, Esq. London. W. Benning and Co., Fleet Street. 1847.

THE editors state that—

"In originally preparing the Treatise for the press, an attempt was made for the first time to arrange and methodize this branch of law, and to extract from the loose and scattered authorities then extant, some definite principles for determining the right of property in fixtures.

"With regard to the arrangement of the work, the rights of a common tenant, and of the executors of tenants for life, in tail and in fee, in respect of fixtures, are discussed in separate chapters. This order, though it has unavoidably occasioned some repetition, will, it is trusted, be found very convenient for reference, and may tend to remove the confusion which has frequently been complained of, in distinguishing the rights of these several classes of persons.

"The other descriptions of property which form the subject of the Treatise are examined principally in the chapter concerning the rights of the executor of tenant in fee. In the concluding section of that chapter, the nature and principles of heir-looms are discussed, together with the right of property in charters relating to land; and the claims of the heir against the executor in respect of chattels animate, as incident to the inheritance. In the same section a general view is taken of the doctrine of emblements; and a separate division has been appropriated to an examination of the right of property, which accrues in consequence of annexations made to the freehold of the Church. The law relative to ecclesiastical dilapidations is also incidentally noticed in connection with the general subject of the work.

"The remaining chapters of the first part of the Treatise relate to the transfer of fixtures, considered with reference to the conveyance of them by sale, mort-

gage, devise, bankruptcy, &c. And in the last chapter some general properties of annexations to the freehold are treated of, more particularly as affecting the rights and liabilities of persons in regard to poor's-rates, parochial settlements, &c.

"The second part of the work contains the remedies of parties in respect of fixtures, together with the rights of creditors, and the criminal law as it affects property attached to the freehold."

We do not attach any great weight to the utility of this work, because it is but a fragment of the law of landlord and tenant, and scarcely deserving of a distinct set of treatises. However, this edition is a great improvement on the last, and contains all the law on the subject, very plainly set forth, and fully noted with cases.

Analytical Digest of all the reported Cases determined by the High Court of Admiralty of England, the Lords Commissioners of Appeal in Prize Causes, and on Questions of Maritime and International Law, by the Judicial Committee of the Privy Council. By William Tarn Pritchard, one of the Proctors of the Ecclesiastical and Admiralty Courts in Doctors' Commons. London. W. Benning and Co. Fleet Street. 1847.

THIS is a very able compilation, and one which will prove of great use to the profession. The preface gives a succinct account and history of the Admiralty judicature. The object of the present work, to which we must confine ourselves, is thus stated in the preface.

"Recurring to the present work, the author would observe with reference to the manner of its execution, that his main object has been to exhibit and elucidate the law and practice of the Court of Admiralty and of the courts of appeal therefrom, as embodied in their recorded decisions. As auxiliary to this object, and with a view to present this branch of the law to the reader in its entirety, the author has, in accordance with the suggestions of the learned gentleman before referred to, embraced in his scheme the cases *in pari materia* in the common law, equity, and ecclesiastical courts, and the statutes applicable to all the cases reported; in doing which he is aware that, in many parts of the work, he is open to the charge of having to some extent exceeded the limits to which such analogies should be confined; for which he has to solicit the indulgence of his readers, reminding them, however, that as redundancy is a fault more venial than omission, he has, in all instances which he doubted, considered it expedient to admit rather than to reject."

The author has also wisely striven to extract the dicta of the judges, and to present the principles which are embodied in their decisions, together with the facts on which they have proceeded. Authorities and text books are likewise cited. These authorities are not however given *in extenso*, but are rationally and ably condensed. Lord Tenterden on Shipping, Smith's Compendium of Mercantile Law, Parke on Marine Insurance, Gresley's Law of Evidence, by Calvert, and the "Short Notes" in the LAW MAGAZINE, are the chief authorities cited.

Events of the Quarter.

SIR ERSKINE PERRY has been appointed to the high office of Chief Justice of Bombay, very little, we believe, to the satisfaction of the Presidency. Some little surprise has been manifested here at the appointment of Mr. W. Yardley, one of the juniors on the North Wales circuit, to the office of Puisne Judge of Bombay! There are circumstances which rendered it very necessary that an experienced lawyer should have occupied this post. Mr. (now Sir William) Yardley is a gentleman of great amiability and respectable attainments, but we understand that members of the bar of more experience and standing have been entirely passed over! This is not the only judicial appointment recently made which has tended to shake confidence in the wisdom and impartiality which ought to determine the dispensation of similar offices. One of the newspapers states that Sir William Yardley was a County Court judge. He never held any other appointment than that of Revising Barrister, and was called in 1837.

The New County Court judges are to be paid by salaries, instead of fees, from the 1st of October last. This is penny wise and pound foolish. A large glut of business, and a surfeit of fees, followed the opening of the courts, which the government imagines it can pocket, putting the judges, according to the power of the act, on their fixed salaries. The probability is, that when the glut is exhausted, and the extremely defective judgments often given in these courts are appreciated, the fees will fall considerably below the amount of the salaries which the government is so anxious to make permanent. The business of insolvency has also been transferred to these courts.

We regret to announce the death of the Right Hon. Sir John Bernard Bosanquet, Knight, who expired at his residence on Hampstead Heath, on September 26th. He was born in 1773. His father, Mr. Samuel Bosanquet, who resided in Essex, was descended from a family of French extraction. Sir J. B. Bosanquet was called to the bar in the year 1800. In 1814 he was made Serjeant-at-Law, and in 1827 King's Serjeant. In 1830 he was created Judge of the Court of Common Pleas by the Duke of Wellington, then Premier. In that office he conducted himself with universal satisfaction to the public and the profession, and evinced great impartiality and ability in his decisions. In 1842, in consequence of ill-health, he resigned his

office, in which he was succeeded by Mr. Justice Cresswell. Sir J. B. Bosanquet was a Privy Councillor. During the years 1835 and 1836 he filled the post of Commissioner for executing the office of Lord Chancellor. By his demise another pension reverts to the crown.

We are sincerely happy to learn, that an incident related by the *Law Times*, as having occurred at a metropolitan county court, has been succeeded by urbanity of conduct, which relieves us from the necessity of further remark on the subject.

It is rumoured, among other changes, that the government intends transferring the jurisdiction of the Quarter Sessions to the judges of the County Courts. We can contradict this report. The judges of the County Courts are in many instances wholly incompetent to the office, and no such arrangement is contemplated. Wherever a competent judge exists it is of course in the power of the magistrates of the county to elect him their chairman, on his qualifying.

The country is now without a Poor Law administrative body. The election of Mr. F. Lewis for Herefordshire, and the appointment of Sir Edmund Head, Bart., to the lieutenant-governorship of New Brunswick, leaves Mr. Nichols the sole member of the triumvirate. The new commissioner is not yet named. He will be the sole head of the board, in conjunction with four cabinet ministers.

In all probability no law reforms of moment will be carried next session. A new parliament of the complexion this bears will not prove prolific of much matured fruit at first.

List of New Publications.

A Treatise on the Law of Legacies. By the late R. S. Donnison Roper, Esq., Barrister-at-Law, and by Henry Hopley White, Esq., Barrister-at-Law, of the Middle Temple. The Fourth Edition. In 2 vols., royal 8vo., price 3*l.* 3*s.*

An Analytical Digest of all the reported Cases determined by the High Court of Admiralty of England, the Lords Commissioners of Appeal in Prize Causes, and (on questions of Maritime and International Law) by the Judicial Committee of the Privy Council; also of the analogous Cases in the Common Law, Equity, and Ecclesiastical Courts, and of the Statutes applicable to the Cases reported with Notes, from the Text Writers, and other authorities on Maritime Law, and the Scotch, Irish, and American Reports; and an Appendix, containing the principal Statutes, &c. &c. By William Tarn Pritchard, one of the Proctors of the Ecclesiastical and Admiralty Courts in Doctors'-Commons. In royal 8vo., price 1*l.* 10*s.* boards.

A Practical Treatise on the Act for the Registration, Regulation, and Incorporation of Joint Stock Companies, 7 & 8 Vict. c. 110, (as amended by 10 & 11 Vict. c. 78.) with directions for the Provisional and Complete Registration of Companies; intended as a Guide to Persons concerned in the Formation and Management of Companies towards Compliance with the Provisions of the Registration Act. To which is added, a Precedent of a Deed of Settlement, prepared and settled in conformity with the Provisions of the Act. By George Taylor, Writer to the Signet, Assistant Registrar of Joint Stock Companies. In 8vo., price 14*s.* boards.

The Ecclesiastical Statutes at Large, extracted from the great body of the Statute Law, and arranged under separate heads. By James Thomas Law, M.A., late Special Commissary of the Diocese of Bath and Wells. In 5 vols., 8vo., price 3*l.* 3*s.* boards.

An Analytical Digest of selected Practice Cases decided in the Common Law Courts to Trinity Term, 1847, arranged under the several heads of Practice for the facility of reference. By Richard Morris, of the Middle Temple, Barrister-at-Law. In 8vo., price 16*s.* cloth.

Plain Instructions to Executors and Administrators, showing their duties and responsibilities, with abstracts of the Legacy Acts, and a Fictitious Will comprising every description of Legacy, with the Forms filled up for every Bequest. By John H. Brady, late of the Legacy Duty Office, Somerset House. The eleventh edition. Price 8*s.*

The Parliamentary Privilege of Freedom from Arrest in Civil Actions considered and defined. By T. H. F. Price 1*s.*

A Law Lexicon or Dictionary of Jurisprudence, explaining all the technical words and phrases employed in the several Departments of English Law, including also the various legal Terms used in Commercial transactions, together with an explanatory as well as literal translation of the Latin maxims contained in the writings of the ancient and modern Commentators. By J. J. S. Wharton, Esq., Barrister-at-Law. In 1 vol. royal 8vo., price 1*l.* 17*s.* boards.

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A DIGEST
 OF
ALL THE CASES, IN ALL THE COURTS
 OF
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 AND IN THE
ADMIRALTY, ECCLESIASTICAL AND BANKRUPTCY
Courts,
 CONTAINED IN THE STANDARD REPORTS.

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2 Com. B. part 5.
4 Dowl. & L. part 1.

2 Car. & K. part 2.
9 Ir. Law R. parts 1 & 2.

ABATEMENT.—*Plea in—Nonjoinder of joint contractors—Affidavit.*—An affidavit verifying a plea of nonjoinder of co-contractors with the defendant, stated the residence of one as No. 20, Gower Street, Bedford Square, and of another as High Street, Canterbury. The court, on affidavit by the plaintiff that inquiries had been made at the respective places mentioned, and that no such persons as those named were living there, set aside both the plea and the affidavit, although the defendant showed that the mistakes had been made accidentally, and that the one party was to be found at No. 22, instead of No. 20, and that his name was in the Post Office Directory, and other similar works of reference, as residing at No. 22, and that the other party was well known in Canterbury, and that he lived in a street adjoining to the one named. *Newton v. Stewart*, 4 D. & L. 89.

And see **PLEADING**, 2.

ACQUITTAL OF CO-DEFENDANT. See **NISI PRIUS**, 1.

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AMENDMENT.—*Of process—Statute of limitations.*—In order to save the statute of limitations, the court will allow an alias and pluries writ of summons to be amended by inserting therein the date of the first writ and return thereto. *Culverwell v. Nugee*, 4 D. & L. 30.

And see **EJECTMENT**, 1. **VARIANCE**.

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ARBITRATION AND AWARD.—1. *Excess of authority by arbitrator—Judgment—Surplusage.*—The matters at issue in the
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action, together with all claims in respect of the mesne profits of the land in question, and all matters in difference between the parties and of the costs of this action, and of the reference to be made pursuant to this order, were, after issue joined in an action of ejectment, referred by a judge's order to arbitration. The arbitrator awarded that judgment for the plaintiff be entered in the said action, with 1s. damages, and that the plaintiff do recover under the same judgment a plot or parcel of land situate &c. (describing it), "and I do further award, &c. that the said defendant shall pay the sum of 2l., as and for the mesne profits of the said land, and the plaintiff's costs of the said action, to be taxed by the proper officer, and the sum of 2l. 10s. in part of the said plaintiff's costs of the reference; and I do award, &c., that except as aforesaid each party shall pay his own costs of the said reference, and that the costs of this my award shall be paid and borne by them in equal moieties." The plaintiff having signed judgment accordingly: Held, first, that the arbitrator had exceeded his authority in ordering a judgment to be entered up, and that therefore the judgment must be set aside; and, secondly, that there was no ground for setting aside the award, as that portion of it which related to the judgment might be rejected as surplusage, and a good award would still remain. *Doe d. Body v. Cox*, 4 D. & L. 75.

2. *Setting aside award—Inconsistent findings—Duty of arbitrator—Damages—Rule nisi.*—Plaintiff declared in case, alleging that he was entitled to the reversion in a close; that H. had wrongfully and injuriously erected incumbrances thereon, and that defendant wrongfully and injuriously kept and continued the incumbrances so wrongfully erected. Pleas—1. Not guilty; 2, that H. did not erect incumbrances on the close. The cause was referred to an arbitrator, who was to direct how the verdict was to be entered on the issues, and to say what should be done between the parties respecting the land or premises. He awarded that the first issue should be entered for the plaintiff, without damages, and the second issue for defendant, and that nothing should be done by the parties respecting the land or premises. On motion to set aside the award, on the ground that the findings were inconsistent, and that the arbitrator had not awarded what was to be done by the parties: Held, 1, that the first plea put in issue only the continuance of the nuisance by the defendant, and that the finding thereon was therefore not inconsistent with that on the second plea; 2, that the arbitrator was not bound to direct any thing to be done: Held, further, that, although the award was bad for not giving damages on the first issue, the objection could not prevail, because the rule nisi had not been obtained on that ground. *Greenfell v. Edgcombe*, 7 Q. B. 661.

3. *Setting aside award—Practice—Order of reference.—Production of trustee.*—Where an award is made on a submission by order of reference at nisi prius, the order of reference does not belong exclusively to either party; but the party holding it holds it for the benefit of both parties, and is bound to produce it in order to its being made a rule of court. Where a submission was by order of

reference at nisi prius, and the defendants, in whose favour the award was made, had possession of the order of reference, and although requested by the plaintiff, delayed making it a rule of court till it was too late to move within the time ordinarily limited for setting aside an award, the court ordered the defendants either to make the order of reference a rule of court, or to file it with one of the masters, so as to enable the plaintiff to make it a rule of court, and allowed the plaintiff to move to set the award aside in a subsequent term nunc pro tunc. *Bottomley v. Buckley*, 4 D. & L. 157.

ARGUMENTATIVENESS. See PLEADING, 1.

ARREST.—*Affidavit.*—Where a capias has been placed in the hands of the sheriff for the arrest of a defendant, and he thereupon waited on the defendant and told him a writ had been lodged with him for his arrest, and the defendant thereupon paid to the sheriff the sum indorsed on the writ in lieu of special bail: Held, that such a proceeding did not amount to an arrest. *Browne v. Ibbotson*, 9 Ir. L. R. 66.

ASSUMPSIT.—1. *Breach of promise of marriage—Costs—Certificate under 43 Eliz. c. 6, s. 2.*—The stat. 43 Eliz. c. 6, s. 2, which authorizes the judge to grant a certificate to deprive the plaintiff of costs, where less than 40s. damages are recovered, is still in force as to actions on promises; e. g., in actions for breach of promise of marriage. *Townshend v. Syme*, 2 C. & K. 1381.

2. *Contract—Declaration—Materiality.*—In assumpsit for the price of and the setting up of a fourteen horse power engine, the last instalment to be paid two months after its completion, it appeared that the degree of power in the engine delivered was not equal to the power mentioned in the contract, and improvements and alterations were made by plaintiff from time to time till the action was brought: Held, 1st, that common counts would lie; 2dly, that the term "completion" did not apply to the mere making of improvements and alterations; 3dly, that the degree of power of the engine was a material part of the contract. *Parsons v. Saxter*, 2 C. & K. 266.

3. *Plea of non-assumpsit.*—In indebitatus assumpsit for goods sold and delivered, the defendant cannot show, under the plea of non-assumpsit, that at the time of the sale the goods sold did not belong to the vendor, and that they were afterwards reclaimed by the real owner. *Walker v. Mellon*, 2 C. & K. 346.

ATTACHMENT. See ATTORNEY, 2.

ATTORNEY.—1. *Bill, form of.*—An attorney's bill must give, in some part of it, substantial information of the court in which the business has been done. *Engleheart v. More*, 4 D. & L. 60.

2. *Undertaking—Consideration—Attachment.*—Final judgment having been signed against G., his attorney wrote to the plaintiff as follows: "In consideration of your agreement to suspend execution upon this judgment, I hereby undertake to make an arrangement with you respecting payment of the debt and costs prior to G. being discharged from prison under his present detainers; or, in the event of

your not agreeing to the terms offered by me, to inform you in sufficient time of G.'s intended discharge, so that you may not be deprived of your power of lodging a detainer against him:" Held, not to amount to such an undertaking to pay debt and costs as the court would enforce. It is no answer to a rule, calling upon an attorney to perform his undertaking, given in a cause in this court, that he is an attorney of this court. *Thompson v. Gordon*, 4 D. & L. 49.

BAILIFF.—*Justification—Statement of grounds of demurrer.*—In an action of trover the defendant pleaded that the supposed grievance was committed after the passing of 7 & 8 Vict. c. 19, intituled "An Act for regulating Bailiffs of inferior Courts;" that the defendant had been duly appointed to act as bailiff in execution of the process of the Tolsey Court of Bristol, which court has by charter jurisdiction for the recovery of debts; and that the defendant then became, and at the time of committing the supposed grievance was a bailiff of the court; and that the supposed grievance was a thing done in pursuance of his duty as such bailiff; and that no notice of action was given: Held sufficient, and that the defendant was justified on the ground that he was bailiff de facto. A demurrer to a plea stated in the body of it, and also in the margin, that the plea was insufficient for the like grounds of objection as those taken to a former plea: Held a sufficient statement of the special causes of demurrer. *Brahan v. Watkins*, 4 D. & L. 42.

BANKRUPT AND INSOLVENT.—1. *Bankrupt charging in execution—Interim order.*—Where a defendant was brought up in custody of a gaoler for the purpose of being charged in execution, and it appeared that a commissioner of bankrupts had on the preceding day granted an interim order for his protection, the court refused to allow him to be charged in execution. *Sloman v. Williams*, 4 D. & L. 49.

2. *Bankrupt—Priority of writs—Title of assignees.*—B. entered up judgment on a warrant of attorney and sued out a fi. fa., under which the sheriff seized. W. afterwards lodged a fi. fa. with the same sheriff, in a bonâ fide adverse action against the same debtor, and the sheriff delivered a warrant in W.'s action to the officer already in possession. The goods seized were sufficient only to satisfy B.'s execution. Before any sale a fiat in bankruptcy issued against the debtor. The assignees claimed the goods, and on interpleader rule this court directed an issue between B. and the assignees to try whether B. was entitled to the proceeds of the goods, which, by direction of the court, were in the mean time sold, and the produce paid into court. The issue was decided in favour of the assignees, on the ground that B.'s writ was founded upon a judgment on warrant of attorney, and had not been executed by sale before the fiat. Held, that the issuing of the fiat rendered B.'s writ void, and thereupon W.'s writ, having already attached upon the goods provisionally, became in effect the first writ, and W. was entitled to have his execution satisfied out of the proceeds, and that the assignees could not first claim any part of them under stat. 6 Geo. 4, c. 16, s. 108, for

rateable distribution among the creditors. The sheriff, while holding the goods of T. and G. under B.'s writ, received a fi. fa. at the suit of L. in a bonâ fide adverse action, and delivered a warrant under that writ to an officer not holding any warrant under B.'s writ, and the officer, before fiat issued, seized goods the separate property of T., in his private house, which goods, if applicable to B.'s execution, would have been exhausted by it: Held, as between L. and the assignees, that L. was entitled to priority as in the case above stated. *Graham v. Witherby*, 7 Q. B. 491.

3. *Insolvent—Interim order under 7 & 8 Vict. c. 96, s. 22.*—Where an insolvent has obtained an order under 7 & 8 Vict. c. 96, s. 22, his person only is protected from process, and consequently such an order is no bar to an action for a debt existing previous to its being made. *Toomer v. Gingell*, 4 D. & L. 182.

BILL OF EXCHANGE.—1. *Averment of presentment—Venue—Pleading.*—By Reg. Gen. Hil. Term, 4 Will. 4, II. r. 8, no venue is required to be stated in a declaration, except the one alleged in the margin; and therefore in an action by the indorsee against the indorser of a bill of exchange drawn payable in London, where the venue stated in the margin of the declaration was London, it was held that an averment of presentment, not stating where, sufficiently alleged a presentment in London. *Boydell v. Harkness*, 4 D. & L. 178.

2. *Plea of non-assumpsit.*—In assumpsit on a bill of exchange by indorsee against acceptor, the defendant pleaded non-assumpsit: Held, that the cause could not be tried on this plea, and, the jury being sworn, the plaintiff took a verdict for the amount of the bill and interest, without adducing any evidence, and without putting in the bill. *Neale v. Proctor*, 2 C. & K. 456.

BOND.—*Suggestion of breaches.*—A judgment entered on a bond with warrant of attorney, containing a release of errors, which bond was conditioned to levy and collect all such sums as should be presented by the grand jury of a county, comes within the provision of the 9 Will. 3, c. 10, s. 8, and it is necessary that a suggestion of breaches be entered before execution issues. *Perrin, J. (dissentiente.) Stratton v. Codd*, 9 Ir. L. R. 1.

BOUGHT-NOTE. See RAILWAY COMPANY, 5.

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CERTIORARI.—*Special bail.*—A party removing a cause by certiorari into this court, will be compelled to put in special bail, if by such a proceeding the bail in the inferior court are discharged. *Tigar v. McAnassie*, 9 Ir. L. R. 70.

CHARGE. See JUDGMENT DEBT.

CHURCH-RATE.—*Making of church-rate by churchwardens and minority of vestry—Vestry meeting held in obedience to monition, who form a part.*—A monition, founded on an allegation that a parish church was out of repair, issued from an ecclesiastical court, requiring the churchwardens to call a vestry for the purpose of

making a rate, and the parishioners to meet in such vestry and then and there make a rate for repair of the church and decent celebration of divine service, &c. therein. The churchwardens gave notice of a vestry meeting, and the vestry met in obedience to the monition; when the monition and notice were read, and the churchwardens produced a survey and estimate to which no objection was made; nor was the necessity for the repairs, &c. disputed. A rate of two shillings in the pound was then proposed and seconded; upon which an amendment, stating an objection to church-rates in general, and refusing to make any rate, was proposed and seconded, put to the meeting, and carried by a majority. The chairman then asked whether any further proposition as to amount of rate was made, to which no affirmative answer was returned. Thereupon the churchwardens and other members of the meeting, being the minority of those present, made a rate. A protest was then delivered on behalf of the majority of those present. The churchwardens proceeded against G., a party so rated, in the ecclesiastical court, in a cause of subtraction of church-rate, setting forth the above facts in the libel and in the proofs propounded. The libel, &c. having been admitted to proof, G. declared in prohibition. On general demurrer to the declaration (by which all the facts appeared): Held, 1, that the persons voting for the amendment must be considered as having declined to join in the proceedings of the meeting, the amendment having no reference to the object for which the vestry was summoned under monition; that the persons so voting therefore left the question in the hands of the remainder; and that the rate was legally made. 2. That it was unnecessary again to put the rate formally to the vote, inasmuch as it had been in effect taken into consideration and negatived by the amendment, though it would have been more regular not to put the amendment. Judgment for defendants in prohibition. *Gosling v. Veley*, 7 Q. B. 406.

CINQUE PORTS. See PILOT.

COMMISSION. See EVIDENCE, 2.

CONTRACT.—*Mutuality*.—Where H. contracts to furnish R. with a reasonable quantity of work, at a fixed rate of wages, and R. is bound not to work for any other person or persons for a period of seven years: Held, that there is a mutuality of contract implied, and that H. would be bound to furnish work for the whole period of seven years. *Hartley v. Cummings*, 2 C. & K. 433.

And see ASSUMPSIT. LANDLORD AND TENANT, 1.

COPYRIGHT.—1. *Contemporaneous publication abroad*.—In an action for infringement of copyright in a foreign work there was a contemporaneous publication abroad and in this country: Held, that notwithstanding plaintiff was entitled to recover. *Cochs v. Purday*, 2 C. & K. 269.

2. *Particulars of objection*.—In an action on the case for an infringement of the copyright of a certain book, the defendant pleaded several pleas denying that the plaintiff was the proprietor of the

copyright subsisting, that the books were first published in England, and that the copies complained of were unlawfully printed: Held, on application by the plaintiff to have the notice of objections delivered by the defendants, with their pleas, under 5 & 6 Vict. c. 45, s. 16, amended, that the alleged first publication having taken place abroad, and so far back as the year 1831, it was sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should specify the day or month; but that he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the work, the place where and the time when the first publication took place: Held, also, that he was not entitled to object that some person whose name is to the defendant unknown, and not the plaintiff, was the proprietor of the said copyright, nor that the plaintiff was not himself the author; nor that the work was not first printed or published in the British dominions; nor that the plaintiff never acquired any title by assignment or otherwise to the copyright; nor that there was no valid assignment, &c.; nor that there is no copyright in a work first published out of the British dominions, under such circumstances as the books in question were published; but that he might object that A. B., if any one, and not the plaintiff, was the proprietor, and that at the time of committing the alleged grievances no copyright in the work was subsisting. *Boosey v. Davidson*, 4 D. & L. 147.

COSTS.—1. *Attorney's attendance—Refreshers.*—An attorney is only entitled to one fee for attendance on a motion, and refreshers to counsel stand on the same ground. *Goodison v. Whelan*, 9 Ir. L. R. 90.

2. *Practice—Taxation—Set-off.*—Where a bill of costs is pleaded as a set-off the court has a discretion to order those costs to be taxed without the plaintiff giving an undertaking to pay the amount. *Ulker & Dunne*, 9 Ir. L. R. 105.

And see ASSUMPSIT, 1. FEME COVERT, 1. LANDLORD AND TENANT, 7. REMANET.

COURSE OF DEALING. See EVIDENCE, 2.

COVENANT—1. *In gross—Equitable title—Estoppel—Reversion—Pleading—Repugnancy—Departure.*—Covenant. Declaration, that by indenture between plaintiffs and A. since deceased, of first part; B. therein described as guardian of C. and D., minors and devisees under the will of E. deceased, of second part, and defendant of third part, after reciting that the parties of the first part and B. in right aforesaid, were the owners of the closes, &c. therein after described, subject to mortgage for 3,500*l.*, the interest whereof was payable half-yearly at the office of W., and had agreed to let the same to defendant, it was by the indenture expressed and purported that plaintiffs and A., with the consent and approbation of B., did demise the closes to defendant, his executors, &c., for seven years, yielding and paying therefor yearly during the demise 15*3*l.** 1*1*s.** at the office of W. aforesaid, in part of the interest on the mortgage, by equal half-yearly payments; covenant by defendant with plaintiffs,

and A., their heirs, &c. to pay the yearly sum at the place and in the manner before mentioned; breach, non-payment of parcel of a half-yearly sum due since the death of A.; averment, that plaintiffs and A., or any or either of them, never had any reversion in the premises purported to be demised; plea, that the reversion of the demised premises, expectant on the determination of the demise, was at the making of the indenture and from thence to the death of A. in plaintiffs and A., and from her death until making of the after-mentioned indenture was in plaintiffs, who before breach assigned the reversion by indenture to S.; verification. Replication, that no reversion in the supposed demised premises expectant, &c. was at the time, &c., or from thence, &c., in plaintiffs and A., or from her death until, &c., in plaintiffs: conclusion to the country: Held, on general demurrer, that the recitals showed the lessors to have only an equitable title; that the facts being disclosed on the face of the lease, either party was estopped from denying that the lessors had a legal reversion; that the covenant for payment of an annual sum was a covenant in gross; that the declaration was not inconsistent or repugnant; that the plea was bad for passing over the averment in the declaration, that the plaintiffs had no reversion, and assuming that they had a reversion, averring that they assigned it; that the replication was not a departure. *Quære*, whether the annual sum covenanted to be paid was a reversion. *Semble*, that the lessee was estopped by the recitals in the lease from averring that the lessors had a legal reversion. *Pargeter v. Harris*, 7 Q. B. 708.

2. *To renew leases—Absolute or qualified covenant—Covenants for title,—for quiet enjoyment.*—Where in an action of covenant the declaration contained four counts on a deed, and the third stated that the deed contained a covenant for rent and also a covenant for title to make such renewal, and in the breach averred that the defendant had not title to renew: Held, on a plea of non est factum to all the counts, the third count could not be supported by proof of a deed not containing a covenant for title to make such renewal, and therefore that a general verdict found for substantial damages upon all the counts was bad. Held, also, that an unqualified covenant to renew did not imply a covenant for title to renew. Held, also, (per Crampton,) that the unqualified covenant to renew was not qualified by a covenant for quiet enjoyment, the covenants not being connected with each other. *Kean v. Strong*, 9 Ir. L. R. 74.

3. *To renew leases—Exception—Direction of judge—Damages.*—A lease for years containing a covenant to renew, which was declared on as absolute and unqualified, and the value of the interest under such lease, with the covenant for renewal, being proved, and no evidence being offered of the eviction of the covenantor by title paramount, but bare evidence of a notice served by the defendant, stating he had no title to renew: Held, on exception, that the judge was right in refusing to direct the jury to find for nominal damages, as there was no evidence that the title to the term if granted would have been invalid. *Semble*, such refusal is not ground of exception. *S. C.* 9 Ir. L. R. 83.

COVERTURE. See FEME COVERT.

CROSS ACTION. See ESTOPPEL.

DAMAGES. See COVENANT. ESTOPPEL. TROVER.

DANGEROUS ANIMALS. See NEGLIGENCE.

DEBT ON JUDGMENT. See MANOR COURT.

DE INJURIA. See LANDLORD AND TENANT, 8.

DEMAND OF POSSESSION. See EJECTMENT, 1.

DEMURRER. See BAIFF.

DEVASTAVIT. See MANOR COURT.

DISTRINGAS. See PROCESS.

DIVISIBLE ALLEGATION. See PLEADING, 4.

DUPLICITY. See PLEADING, 2.

EJECTMENT.—1. *Demand of possession—Amendment.*—Several brothers and sisters divided certain property between them at their mother's death, supposing it to have been her's, and verbally allotted a house to a sister; the property really had been their deceased father's: Held, in ejectment by the father's devisee (one of those brothers), that he could not recover without a demand of possession; and the demand of possession being after the day of demise, the judge would not allow an amendment by altering the day of the demise, as the arrangement was equitable. *Doe d. Loscomb v. Clifford*, 2 C. & K. 448.

2. *Evidence of seisin.*—In ejectment, evidence that the shutters of the house claimed were repaired, and a washhouse built on the premises, and that this was paid for by W. L., is evidence to go to the jury of the seisin of W. L. *S. C. ibid.*

3. *Improper execution of power—Particulars of defects.*—In ejectment brought by remainderman against lessee of the late tenant for life, on the ground that lease was granted under a power not properly executed, the court will, on motion, order the lessor of the plaintiff to give particulars of the alleged defects in the execution. *Doe d. Earl of Egremont v. Williams*, 7 Q. B. 686.

4. *Statute of Limitations* (3 & 4 Will. 4, c. 27.)—The 3 & 4 Will. 4, c. 27, s. 2, does not apply to rent reserved on a demise. Ejectment for nonpayment of rent is maintainable during the continuance of a lease, although more than twenty years have elapsed since the last payment.—*Crosbie v. Sugrue*, 9 Ir. L. R. 17.

5. *Judgment for plaintiff under stat. 4 Geo. 2, c. 28, s. 2.*—In ejectment by landlord against tenant, where half-a-year's rent was due before service of declaration, and no sufficient distress was found on the premises, if the defendant, having entered into a consent rule, does not appear at the trial, and the plaintiff is thereupon nonsuited, the lessor of the plaintiff may, under stat. 4 Geo. 2, c. 28, s. 2, have judgment, although there has been no formal demand of rent or re-entry, but the judgment must be only against the casual ejector, not

the defendant. *Doe d. Bedford Charity Trustees v. Payne*, 7 Q. B. 287.

ERROR.—*Writ of error under stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 8*—*Bill of exceptions*—*Issue directed under Interpleader Act*—*Quashing writ of error*—*Amendment of record*—*Estoppel by accepting costs*.—A writ of error to the Exchequer Chamber from the Court of Queen's Bench, under stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, recited that error was alleged in the record and process and giving of judgment "in a plaint in an action on promises," and directed that the transcript should be sent to the justices of the Common Bench and barons of Exchequer, to be viewed and examined, &c. By the transcript it appeared that the judgment was on an issue directed by the Court of Queen's Bench, under stat. 1 & 2 Will. 4, c. 58 (the Interpleader Act), and no process by summons appeared; but the declaration was, in form, on promises upon a wager, and the judgment was that the plaintiff should recover his damages, costs and charges. The defendant below had tendered a bill of exceptions. On motion the Court of Exchequer Chamber quashed the writ of error, holding that the transcript showed that they had no power to view and examine; and holding also that it varied from the writ of error. By the Court of Exchequer Chamber:—The order quashing the writ is matter of record, examinable, upon error, in the House of Lords. By the Court of Queen's Bench:—A judge having ordered, on summons by the plaintiffs in a cause depending in error, that the plaintiffs should be at liberty to amend the record (the matter amended not being misprision of the clerk), and also that they should pay the defendant his costs occasioned by such amendment, the defendant cannot, after taxing and receiving his costs, apply to set aside the order for amendment, as made without jurisdiction. *King v. Simmonds*, 7 Q. B. 289.

And see **INTERPLEADER**.

ESCAPE.—*Warrant of commissioner of bankrupt.*—In an action for an escape against a sheriff where the prisoner was brought up to London from the country in obedience to a warrant issued by a commissioner of bankruptcy, and permitted to remain there three days, though remanded back by the learned commissioner, (one of them, however, being a Sunday, and another a day appointed for the prisoner to appear before a judge at chambers by virtue of a writ of habeas corpus,) and to repair from place to place, attended by the gaoler: Held, that the above-mentioned facts did not constitute an escape in contemplation of law. *Nias v. Davies*, 2 C. & K. 280.

ESTOPPEL.—*Damages*—*Cross action*.—To a declaration for unskilfully constructing a kitchen range, the defendants pleaded by way of estoppel that they sued the now plaintiff for the price of constructing the range, and that he pleaded payment into court of 42*l.*, which the now defendants accepted in satisfaction: Held, on demurrer, that the plea did not amount to an estoppel, and afforded no answer to the action. *Rigge v. Burbidge*, 4 D. & L. 1.

And see **COVENANT**, 1.

EVIDENCE.—1. Agreement to explain acts of repair—Objecting to evidence at nisi prius.—Defendant, at nisi prius, to prove a public right of way over plaintiff's land, showed acts of repair done in a certain year by C. the township surveyor. Plaintiff offered to prove, in answer, an agreement made in that year between C. and the steward of plaintiff's predecessor, that C., in consideration of repayment by the steward, should repair a road which, according to plaintiff's case, was the road now in question. Defendant's counsel objected, because it did not appear that the steward, in that character, had authority to make such agreement. The judge received the evidence, which was not further objected to, and plaintiff had a verdict. On motion for a new trial on account of the improper reception of evidence, the former objection was renewed; and it was urged also, that the evidence, when given, did not show that the road to which the agreement related was the same as that now in question. Held, 1, that assuming the roads to be identified, the agreement, even if the steward had no sufficient authority, was evidence to explain the fact of repair, and was properly admitted. 2. That if the evidence failed to identify the roads, that objection should have been made at nisi prius when the defect appeared, and the judge should have been requested to strike the evidence out of his notes, and that the point could not now be raised. *Ferrand v. Milligan*, 7 Q. B. 730.

2. Commission—Course of dealing—Evidence.—By an agreement between an African merchant and an African captain, the latter was to have a commission of 6l. per cent. on the net proceeds of the homeward cargo, after deducting the usual charges: Held, that parol evidence was not admissible to show, that, under this kind of contract, according to the course of dealing between African captains and African merchants, the captain was entitled to his commission on the whole amount for which the cargo had been sold, and not merely on the net sum that had come to the hands of the merchant as the result of that sale.—*Cuine v. Horsefall*, 2 C. & K. 349.

3. Foreign law, mode of proving.—A witness expert in the law of a foreign country was called to prove what that law was: Held, that he should state on his responsibility what the law was, and not read any fragments of a code. *Cocks v. Purday*, 2 C. & K. 269.

4. Secondary evidence—Memorial of registry in Middlesex.—If a deed be in the possession of a third person as mortgagee, and he having the deed in court, though not subpoenaed in the cause, decline to produce it, secondary evidence may be given of its contents; but if the deed is not in court, and he has not been subpoenaed to produce it, it is otherwise. The person thus declining to produce a deed must not state the contents, but he must state the date of the deed and the name of the parties, in order to identify it. An examined copy of a memorial of a purchase deed registered in Middlesex, under the stat. 7 Anne, c. 20, is only receivable as secondary evidence of the deed against the parties to the deed and all persons claiming under them; and the fact that A. mortgaged the property to B., and delivered this deed to B. as mortgagee, is not sufficient to

make it secondary evidence against A. *Doe d. Loscombe v. Clifford*, 2 C. & K. 448.

5. *Secondary evidence*—*Transcripts of parish registers under 70th canon of 1603*.—In ejectment it being proved by the rector of the parish of C. that no parish registers existed there of earlier date than 1733, the transcripts of the registers of that parish for 1705 and 1706, returned under the 70th canon of 1603, were produced by the registrar of the diocese from the bishop's registry, and received as evidence of a marriage in 1705, and a baptism in 1706, of persons through whom the lessor of the plaintiff traced his title. *Doe d. Wood v. Wilkins*, 2 C. & K. 328.

6. *Witness—Competency of*, under 6 & 7 Vict. c. 85.—A witness in an action brought to recover certain commission or brokerage, stated on the voir dire that he had a claim to one moiety of whatever commission the plaintiff should receive: Held, that the evidence of the witness was admissible under the 6 & 7 Vict. c. 85 (Lord Denman's Act). *Hill v. Kitching*, 2 C. & K. 278.

And see FALSE IMPRISONMENT. FEME COVERT. LANDLORD AND TENANT, 2, 3. LIMITATIONS, STATUTE OF. MANOR COURT. PARTICULARS.

FALSE IMPRISONMENT.—*Justification—Felony—Suspicion—Evidence*.—In an action for false imprisonment, the defendant pleaded his goods had been stolen, and having cause to suspect the plaintiff of the felony, he gave her into custody, the plea stating several grounds of suspicion. The plaintiff called a policeman to prove that the defendant directed him to take the plaintiff into custody; and in his cross-examination the policeman said that, at the same time and in the presence of the plaintiff, the defendant stated that the goods had been stolen, and also stated some of the grounds of suspicion mentioned in the plea: Held, that this was evidence for the jury to consider, and from which they might find that the felony had been committed, and that the defendant had good cause to suspect the plaintiff, if this evidence satisfied them that the facts really were so; held also, that although in this plea the defendant ought to set out his grounds of suspicion, yet that he would be entitled to a verdict without proof of the whole of them, if he proved that a felony was in fact committed, and proved so much of the grounds of suspicion as satisfied the jury that he had reasonable cause to suspect the plaintiff. *Williams v. Cresswell*, 2 C. & K. 422.

FEME COVERTE.—1. *Plea of coverture—Costs*.—A feme covert who succeeds on a plea in bar of coverture is entitled to costs. *Findlay v. Farquharson*, 4 D. & L. 185.

2. *Plea of coverture—Right to begin—Evidence of Marriage*.—In an action of debt for goods sold, in which the defendant pleads her coverture, and the plaintiff in his replication denies the coverture, and there be no other issue, the defendant must begin. On this issue the person who is alleged in the plea to be the husband of the defendant is not a competent witness for the defendant to prove his

marriage with her. On this issue proof that the defendant and the person alleged in the plea to be her husband have cohabited together as husband and wife for four years is some evidence of the marriage, which the judge will leave to the jury. *Woodgate v. Potts*, 2 C. & K. 457.

FOREIGN LAW. See EVIDENCE, 3.

FORFEITURE. See LANDLORD AND TENANT, 9.

GENERAL ISSUE. See ASSUMPSIT, 3. LANDLORD AND TENANT, 9. PAYMENT.

GOODS SOLD. See FEME COVERTE, 2. HUSBAND AND WIFE, 1, 2. PAYMENT.

GUARANTEE. See LANDORD AND TENANT, 1.

HUSBAND AND WIFE.—1. *Allowance paid to wife.*—If husband and wife be living apart, and the husband makes the wife a sufficient allowance for her support, he is not liable in an action by a tradesman for goods supplied to her, and it is immaterial whether the tradesman knew of such allowance or not. If a wife living apart from her husband orders goods to be addressed and sent to a third person, and they be sent to the house of such third person, that not being the place of abode of the wife, the husband is not liable to pay for those goods. *Reeve v. The Marquis of Conyngham*, 2 C. & K. 444.

2. *Same.*—If husband and wife be living separate and apart, and the husband make the wife a regular allowance of a sufficient sum for her maintenance, which is regularly paid, this is sufficient to repel the inference of agency, and he is not liable for any debt she may contract; and it is not necessary that there should be any deed of separation; but the allowance must be such as the jury shall think sufficient, reference being had to the station of the parties and the income of the husband.—*Holder v. Cope*, 2 C. & K. 437.

IMPRISONMENT.—*What is.*—Plaintiff attempting to pass in a particular direction, was obstructed by defendant, who prevented him from going in any direction but one, not being that which he endeavoured to pass: Held, no imprisonment, and this whether the plaintiff had or had not a right in the first-mentioned direction. Per Patteson, Coleridge and Williams, J.; dissentiente, Lord Denman, C. J. *Bird v. Jones*, 7 Q. B. 742.

And see ESCAPE.

INSOLVENT. See BANKRUPT AND INSOLVENT.

INTERIM ORDER. See BANKRUPT AND INSOLVENT.

INTERPLEADER. *Payment of money out of court pending writ of error.*—Property taken in execution being claimed by assignees of the debtor, who had become bankrupt, the sheriff sued out an interpleader rule, and an issue was directed, the assignees to be plaintiffs, and the execution-creditor defendant, the money levied being in the meantime paid into court. On trial of the issue the

assignees recovered; but the defendant having tendered a bill of exceptions, error was brought in the Exchequer Chamber. That court gave judgment, quashing the writ of error. The assignees then moved this court to make an order under the Interpleader Act, 1 & 2 Will. 4, c. 53, for payment of money to them; but before cause shown, the defendant brought error in the House of Lords. There being no proof that the last writ of error was frivolous, this court refused to make such order pending the writ. *King v. Birch*, 7 Q. B. 669.

IRISH GRAND JURY ACT.—*Presentment for damages—Malicious injury.*—On an application for a presentment as compensation for the malicious destruction of property by fire, the grand jury are not bound by the conviction of the party who committed the offence. Evidence ought to be produced to satisfy them that the injury was malicious. The burning is malicious within the meaning of the Grand Jury Act, if done for the purpose of injuring any person having an interest in the property. The notice required in case of a malicious burning by 19 & 20 Geo. 3, c. 37, s. 3, to be served in six days, is sufficient, if served six days from the time the injury was completed. *In re Elliott*, 9 Ir. L. R. 100.

ISSUABLE PLEAS. See PLEADING, 3.

ISSUE. See TRIAL, WRIT OF.

JUDGMENT DEBT.—*Stat. 1 & 2 Vict. c. 110, ss. 14, 15—What may be charged by judge's order with a judgment debt—When application may be made to rescind such order.*—The East India Company granted to defendant a pension in consideration of his distressed state and the services of his father: Held, that this could not be charged with a judgment debt by a judge's order under stat. 1 & 2 Vict. c. 110, ss. 14, 15. The judge's order directed that the pension should stand charged, unless cause were shown at chambers in six calendar months. The court rescinded the order, on motion by the East India Company and by an assignee of the pension, within the six months.—*Morris v. Manesty*, 7 Q. B. 674.

JUSTIFICATION. See BAILIFF. FALSE IMPRISONMENT. LANDLORD AND TENANT, 8.

LACHES. See WARRANT OF ATTORNEY.

LANDLORD AND TENANT.—1. *Contract—Guarantee.*—An indorsement, written and signed after the agreement to which it was annexed, purported to guarantee the performance of the covenants and conditions of that agreement, but there was no evidence to show that the guarantee was from the first agreed on between the parties: Held, that the agreement and subsequent indorsement formed but one entire contract, and that therefore the latter did not require a separate consideration. 2ndly. It being part of the agreement that the plaintiff should pay the first instalment of a certain sum on a given day: Held, that a verbal agreement to postpone the day was sufficient. 3dly. It being one of the covenants in the agreement that the

landlord of a certain public-house would accept the plaintiff as tenant, the declaration alleged that the landlord had refused so to accept him: Held, that the plaintiff was not required to prove that the individual who acted as the landlord was the real owner of the premises, or his authorized agent. *Coldham v. Showler*, 2 C. & K. 261.

2. *Demise—Evidence—Surrender.*—In an action by A. against B. for rent on a demise from a quarter to a quarter, with the rent payable one quarter in advance, the defendant pleaded a denial of the demise, a notice to quit, and a surrender by operation of law. A written agreement for this quarterly letting, made while the stat. 7 & 8 Vict. c. 76, s. 4, was in force, was put in, which was signed by B. but not by A.: Held, that this was evidence of a parol demise by A., and that it was put an end to by a parol notice to quit; held, also, that if a tenant have left a house unoccupied, and the landlord enter and be in the profitable occupation of the house, he cannot recover rent from the tenant for any time after such profitable occupation; but if he merely puts a person into the house to take care of it, and to prevent depredations, it would be otherwise. *Bird v. De Fouvieuille*, 2 C. & K. 415.

3. *New lease—Recital—Evidence.*—A., in 1781, by lease demised certain premises to B., his executors and assigns, for a term of sixty-one years and three lives concurrent, with a proviso that in case the lives should drop within thirty-one years, then the lease should be good for thirty-one years. In 1802 he demised the same premises to B., habendum to him and his heirs for the life of C., in the place, room and stead, and by way of exchange, for the life of D., the surviving cestui que vies in the lease of 1781, with a proviso, that in case C. died within the space of eleven years, the lease should subsist for that period; this latter lease also contained covenants not in the former lease: Held, that the lease of 1802 operated as a new lease, and passed a legal estate. *Bowen v. Keatinge*, 9 Ir. L. R. 61.

4. *Notice to quit by landlord.*—Notice was given to a tenant from year to year, holding from Martinmas to Martinmas, to quit "on the 19th day of May next, or upon such other day or time as the current year for which you now hold will expire." The notice was dated and served on 21st October: Held bad. *Doe d. The Mayor, &c. of Richmond v. Morphet*, 7 Q. B. 577.

5. *Same.*—Where a tenant is entitled to six months' notice to quit, a notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. *Doe d. Gorst v. Timothy*, 2 C. & K. 351.

6. *Notice to quit by tenant.*—Tenant from year to year gave his landlord notice to quit, ending a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice. The tenant quitted according to his notice, and the landlord entered and did some repairs: Held, that the tenancy was not determined. *Bessie v. Jandsberg*, 7 Q. B. 638.

7. *Pleading—Costs—Certificate.*—In trespass for taking goods,

the defence, under the stat. 11 Geo. 2, c. 19, s. 3, that the goods had been seized after having been fraudulently removed to prevent a distress for rent, cannot be gone into unless specially pleaded; but where, in trespass against a landlord and his broker for taking goods, there was no evidence against the landlord, and this defence was opened, but could not be gone into, as not guilty, by statute, was the only plea, the judge would not certify, under the stat. 8 & 9 Will. 3, c. 11, s. 1, that there was reasonable cause for making the landlord a defendant, in order to deprive him of his costs. *Spencer v. Harrison*, 2 C. & K. 429.

8. *Pleading—Justification under 1 & 2 Vict. c. 74—De injuriâ.*—Trespass for breaking and entering plaintiff's house. Plea, a justification by defendant, as acting in aid of a constable, to whom a warrant had been issued to give possession to plaintiff's landlord P., under stat. 1 & 2 Vict. c. 74. The plea stated the holding of plaintiff under P. and the terms, that the reversion in fee was in P., notice to quit, P.'s right to possession, plaintiff's refusal to quit, notice by P. of his intention to proceed under the act, P.'s application to the justices, his complaint, plaintiff's non-appearance, P.'s proof to the justices of the matters of his notice and complaint, and of his right to possession, and the issuing of the warrant by the justices. Replication, *de injuriâ*: Held, on special demurrer, that all the above facts necessary to constitute the jurisdiction might be traversed in that form, even assuming that sect. 5 does not protect persons other than peace officers not named in the warrant, and acting in aid of the constables, and would therefore not limit the effect of the traverse; as to which assumption, *quære*. *Edmunds v. Penniger*, 7 Q. B. 558.

9. *Use and occupation—Re-entry—Forfeiture—Determination of term—General issue.*—To a declaration in debt by J. for use and occupation of a messuage, defendant pleaded, that the sum demanded became due from him to plaintiff for such use and occupation for the space of one year; that the Brewers' Company had demised the messuage and certain land to J. by indenture for seventy-one years, with a proviso (in the usual form) for the re-entry, if J. or his assigns should erect any building on the land exceeding seven feet in height; that J.'s term by assignment vested in plaintiff, who demised to defendant for a year, and from thence from year to year, &c., at a rent payable quarterly; that defendant entered and occupied the premises as tenant to plaintiff during the year first mentioned; that after making the indenture, and before the term vested in plaintiff, J. erected a building on the land, contrary to his covenant, and without the company's consent, and that plaintiff continued the same so erected without the consent of the company or defendant until the re-entry after mentioned; and that afterwards, and after the expiration of the said year, and after the accruing of the causes of action, and while the company were reversioners, and before action brought, the company under the said proviso did, for the causes aforesaid, and for the purpose of determining the said term of seventy-one years, from the commencement of the said space of one year re-enter and eject plaintiff, and defendant as his

tenant; and that the company, after the expiration of the said space of one year, and after the accruing of the said causes of action, and before this action was brought, did elect to determine, and did determine, the term of seventy-one years from the time of the commencement of the said one year, for the said breaches of covenant so continuing at and after the commencement of the one year. On special demurrer: Held, that the plea was bad, for—1. No authority appeared by which the company could or did determine the term of seventy-one years from any period, except that of actual re-entry; 2. If the plea showed that the term had ceased before the rent accrued, it amounted to the general issue; 3. If it showed only a determination of the term after the rent accrued, it was no answer to the action. *Selby v. Browne*, 7 Q. B. 620.

10. *Use and occupation—Vendor and purchaser—Imperfect title.*—Where the vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot on these grounds only recover for use and occupation, although the jury find that the occupation has been beneficial. *Winterbottom v. Ingham*, 7 Q. B. 611.

And see COVENANT. NUISANCE.

LEASE. See COVENANT. EJECTMENT. LANDLORD AND TENANT, 2, 3, 9.

LIFE POLICY. See NISI PRIUS, 4.

LIMITATIONS, STATUTE OF.—*Evidence of payments on account within six years.*—A., an attorney, being indebted to B. in several sums on bond and simple contract, bearing interest, from time to time stated accounts with B. in which he debited himself with the interest and took credit for payments, which he made from time to time, on account of B., for the rent and tithes of a farm occupied by B. and other disbursements. The latest of these accounts was stated in 1823, and a balance was struck therein in favour of B.: up to that time the rents and tithes had nearly balanced the interest; but the rents were then considerably reduced. Afterwards A., who took considerable part in the management of B.'s affairs, continued to pay the rents and tithes on B.'s account, and stated a further account with B., in writing, in which he took credit for the payment of rent and tithes, but inserted no item on the debit side. The latest account stated was in 1842. B., in 1843, sued A. for the sums due on simple contract and interest thereon: Held, that the facts above stated were evidence for the jury, from which they might find that the payments of rent and tithes since 1823 were payments made on account of the interest due on the simple contract debts, so as to take the case out of the Statute of Limitations. *Worthington v. Grimsditch*, 7 Q. B. 479.

And see AMENDMENT. EJECTMENT, 4.

LOCAL ACT. See NUISANCE.

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B

MANDAMUS.—1. *Return.*—Where on the face of a return the law and facts are mixed, the court will, before argument on the law, reserve liberty for the prosecutor to file a traverse if necessary. *Regina v. The Corporation of Dublin*, 9 Ir. L. R. 65.

2. *Trinity College statutes.*—This court will grant a mandamus to compel the visitors of Trinity College, Dublin, to proceed to hear and determine the appeal of a party who complains of an undue election of a scholar in said college. The power vested in the visitors by common law to hear such appeal is unrestrained by the college charters or statutes. *Regina v. Trinity College, Dublin*, 9 Ir. L. R. 41.

MANOR COURT.—1. *Judgment of, how proved.*—The judgment of a manor court in a plea of debt is sufficiently proved by production of a minute in the court books containing entries of the pleadings, but setting forth as to the judgment only a form of caption, names of parties and suitors of the court, and a memorandum that a venire facias was executed, verdict found for plaintiff, and final judgment entered for debt and costs, specifying the amounts; the deputy steward of the court stating that he was present at the trial, and that it was not usual to draw up a more formal judgment, and it appearing that a levavi facias had issued reciting a judgment in terms corresponding with the entry. *Danson v. Gregory*, 7 Q. B. 756.

2. *Pleading—Devastavit—Administrator.*—An administrator, sued in the manor court for a debt due from the intestate, pleaded no assets. Replication, that he had assets. Issue thereon and a verdict for plaintiff. Judgment was entered up, execution issued, and nulla bona returned. Plaintiff declared in debt, setting forth these proceedings, and alleging that defendant had at the time of the recovery assets to be administered, and had eloiigned and wasted them. Plea, that at the time of the recovery defendant had fully administered, &c. without this, that he eloiigned or wasted, &c. Issue thereon: Held, that on the trial of this issue defendant could not prove that all assets which had come to his hands at the time of the former recovery had been duly administered, and that the plaintiff might take his objection without having applied the former recovery as an estoppel. *S. C. ib.*

MARRIED WOMAN. See FEME COVERT.

MATERIALITY. See ASSUMPSIT, 2.

MEMORIAL OF REGISTRY. See EVIDENCE, 4.

MUTUALITY. See CONTRACT.

NAVIGABLE RIVER.—*Case for injuring oyster beds—Pleading—Notice of facts, how to be averred—Suspension of corporate functions by ouster of functionaries—Merger of franchise—Licence to fish—Lease of fishery.*—In a declaration on the case for injuring plaintiff's oyster beds in a river by improper navigation of defendant's vessel: averments,—that plaintiffs were lawfully possessed of oyster beds situate in the river and covered with water; that defend-

ant was possessed of a ship of a certain size and draught, then navigating the said river under the management of defendant's servants; that the tide ebbed and flowed in that part of the river; and that at certain periods and states of the tide there, the depth of water covering the said oyster beds was insufficient to float the said ship, "*as the defendant and his said servants before and at the time of the committing, &c. well knew*," are not equivalent, after verdict, to a formal allegation of notice to defendant that the oyster beds existed and were liable to be injured by attempting to pass over them at the times mentioned. *The Mayor of Colchester v. Brooke*, 7 Q. B. 339.

2. *Navigation in public river, right of—Argumentative plea.*—To a count alleging that plaintiffs were possessed of oyster beds in a part of the river, and defendant of a vessel thereon, and that he navigated the vessel over the said part so negligently and at such unseasonable and improper times and states of the tides that she struck the bottom of the said part of the river and injured the oyster beds; defendant pleaded that the said part of the said river, before and at the time when, &c., was open to the sea, and within the flux and reflux of the tide, and was a public navigable river, and the queen's highway for all her subjects with their ships and vessels, "*to navigate, sail, pass and repass, in, upon, through, over and along the same and all parts thereof every year and at all times of the year, and at all times and states of the tide*" at their free will, &c.: Held, after verdict, a sufficient plea in denial of having navigated at unseasonable and improper times, though it might have been bad on special demurrer as argumentative. *S. C. ib.*

3. *Navigation in public river, right of—Low water.*—The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no excess if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves; although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding. *S. C. ib.*

4. *Nuisance—Mischief by negligence.*—If property, as oysters, be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. And therefore the fact that such property was a nuisance is no excuse for running upon it negligently. *S. C. ib.*

5. *Suspension of corporate functions by ouster of functionaries—Merger of franchise—Licence to fish—Lease of fishery.*—A corporation which had an immemorial right to the oyster fishery in a navigable river, to be managed by certain functionaries and courts of the corporation, became, in 1740, by the ouster of several of its members, unable to continue itself or to carry on the management of

the fishery. In 1763 the corporation was re-incorporated by charter, under the old name, and the charter ratified, confirmed and restored to it all fisheries, &c. : Held, that there having been no actual dissolution, the fishery had never come to the crown, and would therefore be in the corporation as it existed under the new charter. Whether if the fishery had come to the crown it could (after Magna Charta) have been regranted by charter, *quære*. The corporation, by a written document, purporting to be an order of a court of the corporation, held for the conservancy of the fishery, granted a licence to certain dredgers to dredge and take the oysters during the oyster season: Held, that this did not operate as a demise of the fishery, putting the corporation out of possession. *S. C. ib.*

NEGLIGENCE.—*Allegation of, in declaration.*—A declaration alleged that the defendant wrongfully kept a ram, well knowing that the said ram was accustomed to butt and injure mankind, and that whilst the defendant kept the same it did butt and gore the wife of plaintiff: Held, on motion in arrest of judgment, that the declaration was sufficient, without averring that the defendant negligently kept the ram. *Jackson v. Smithson*, 4 D. & L. 45.

And see **NAVIGABLE RIVER**, 4.

NEW TRIAL.—*Common Pleas of Lancaster—Writ of trial.*—Where a cause has been tried in a borough court on a writ of trial issuing out of the Court of Common Pleas at Lancaster, a motion for a new trial cannot be made to a judge sitting in banco at Westminster under the 4 & 5 Will. 4, c. 62, s. 26. *Bury v. Peers*, 4 D. & L. 163.

And see **EVIDENCE**, 1.

NISI PRIUS.—1. *Acquittal of co-defendant in trespass.*—In an action of trespass against three, who had all jointly, and by one attorney, pleaded not guilty by statute, the judge at nisi prius would not, on the application of the plaintiff's counsel just before the jury was sworn, allow a nolle prosequi to be entered as to one of the defendants, in order that he might be called as a witness for the plaintiff. Neither would the judge, immediately after the jury were sworn, allow one of the defendants to be acquitted on the application of the plaintiff's counsel, it being stated by the defendant's counsel that he appeared for all the defendants, and objected to such acquittal. If, in an action of trespass against several defendants, there be at the end of the plaintiff's case no evidence against one of the defendants, it is in the discretion of the judge whether such defendant shall be then acquitted; and if from the nature of the evidence given for the plaintiff, it is probable that evidence, which will be given for the other defendants, will fix this defendant with liability, the judge will not allow his acquittal at the end of the plaintiff's case. *Spencer v. Harrison*, 2 C. & K. 429.

2. *Practice—Notice to produce.*—A cause at the sittings at nisi prius was called on upon Thursday, the 4th of February, and the plaintiff's case was closed on that day at four p. m. The case was then adjourned to Friday, the 5th of February, at ten a. m. All the

parties lived in the town, and in the evening of the 4th of February, before nine p. m., a notice to produce a letter of the defendant to the plaintiff was served on the plaintiff's attorney: Held, that this notice to produce was served in time; held also, that if a party is served with a notice to produce sufficiently early for him to be enabled to produce a document, if he thinks proper to do so, it makes no difference that, at the time of the service of the notice, the cause is part heard.—*Sturm v. Jeffree*, 2 C. & K. 442.

3. *Practice—Right to begin.*—In an action on a promissory note the defendant pleaded several pleas as to part, the proof of which lay on him, and also a plea of payment of money into court as to the residue, to which the plaintiff replied damages ultra: Held, that the plaintiff was entitled to begin. *Booth v. Milns*, 4 D. & L. 52.

4. *Same.*—In an action on a life policy the declaration averred that a certain statement by the insured, that he had not been afflicted with certain disorders, which were named, amongst which was rupture, was true. The defendant pleaded that the statement was untrue in this, to wit, that the insured had been afflicted with rupture, concluding with a verification. Replication de injuriâ: Held, that the plaintiffs were entitled to begin. *Ashby v. Bates*, 4 D. & L. 33.

And see EVIDENCE, 1.

NON ASSUMPSIT. See ASSUMPSIT, 3. BILLS OF EXCHANGE, 2.

NON JOINDER. See ABATEMENT.

NOTES OF TRIAL. See SHERIFF.

NOTICE TO PRODUCE. See NISI PRIUS, 2.

NOTICE TO QUIT. See LANDLORD AND TENANT, 4, 5, 6.

NUISANCE.—*Landlord—Local Act.*—In an action on the case for a nuisance arising from the smoke issuing from buildings in the occupation of weekly tenants: Held, that the action was rightly brought against the lessor, and, secondly, that the entering of smoke discharged from defendant's chimneys into plaintiff's house amounted in contemplation of law to a nuisance; but that the fact of all buildings erected on the locality on which defendant's were, being declared common nuisances by statute, was not per se sufficient to entitle plaintiff to a verdict in a civil action, in which the nuisance complained of arose from the smoke. *Rich v. Basterfield*, 2 C. & K. 257.

And see NAVIGABLE RIVER, 4.

PARISH REGISTER. See EVIDENCE, 5.

PARTICULARS.—*Work and labour—Claim for commission.*—In an action for work and labour, the particulars of the plaintiff's demand stated the action to be brought to recover from the defendants the sum of 450*l.* claimed by the plaintiff for his services as clerk or manager to the defendants from October, 1837, to October, 1839. An order was made for further and better particulars, when the plaintiff delivered the same, with the addition of the words "after the rate of 200*l.* per annum:" Held, that the plaintiff could not give evidence of a claim for commission on the amount of business done

by the defendants through his introduction. *Law v. Thompson*, 4 D. & L. 54.

And see EJECTMENT, 3.

PATENT.—*Construction of specification.*—The words of a specification are to be construed according to their ordinary and proper meaning, unless it be shown by something in the context, which may be explained by evidence, that a different construction ought to be adopted. In covenant on an indenture, by which B. was licensed to make and sell buttons according to A.'s patent, the issue was whether certain buttons made by B. were made under the licence. The specification described the invention to consist in the application to the covering of buttons of such figured woven fabrics wherein the ground, or the face of the ground thereof, is produced by a warp of soft or organzine silk, such as is used in weaving satin and the classes of fabrics produced therefrom. The jury asked how they were to understand the word "or" in the specification; whether it was used disjunctively, or whether organzine was the construction of the word "soft." The judge told them that in his opinion, unless the silk were organzine, it was not within the patent: Held, upon a bill of exceptions, that this direction was erroneous; for that the judge should not have told the jury that in his opinion soft and organzine silk were absolutely the same; but that the words were capable of being so construed, if the jury were satisfied that at the date of the patent there was only one description of soft silk, and that organzine used in satin weaving; but otherwise that the proper and ordinary sense of the word "or" was to be adopted, and the patent held to apply to every species of soft silk, as well as to organzine silk. *Elliott v. Turner*, 2 C. B. 446.

PAYMENT.—*Necessity of pleading payment—Ready money transaction.*—*Semble*, that in an action for the price of goods, the defendant cannot prove under a plea of non assumpsit or never indebted that the dealing was for ready money, and the goods paid for when delivered, but the payment must be pleaded. *Littlechild v. Banks*, 7 Q. B. 739.

And see LIMITATIONS, STATUTE OF.

PENALTY. See PILOT.

PENSION. See JUDGMENT DEBT.

PILOT.—*Construction of statute 6 Geo. 4, c. 125, s. 62—Places aforesaid.*—Statute 6 Geo. 4, c. 125, after enacting (sect. 19), under a penalty, that the master of any vessel, bound from the westward to the Thames or Medway, shall take certain steps for obtaining a qualified pilot, and (sect. 58) shall not act himself as pilot under certain circumstances, provides (sect. 62) that nothing shall subject to any penalty, the master being the owner or a part owner of such ship or vessel, and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque

Ports: Held, that the words "any of the places aforesaid" mean Dover, Deal, and the Isle of Thanet, and not others previously mentioned in the act. *Peake v. Screech*, 7 Q. B. 603.

PLEADING. — 1. *Argumentativeness.* — To counts for money lent, &c., the defendant pleaded as to 50*l.*, parcel, &c., that before any breach of the promise in those counts mentioned the plaintiff made a bill of exchange for the payment of 50*l.* four months after date, and that the defendant accepted the bill, and delivered the same to the plaintiff, who then accepted the same in discharge of the sum of 50*l.*, parcel, &c., and then indorsed and delivered the same to S., who from thence hitherto had been and still is the holder of the bill, and entitled to sue thereon. Replication that the defendant did not pay the bill, and that Sharp returned it to the plaintiff, who thereby then became and was the holder thereof, and so remained and continued until and at the time of the commencement of the suit, and still is the holder thereof. Verification: There was a similar plea alleging payment to S., while he was the holder of the bill, to which the plaintiff replied, denying the payment, and alleging that S. returned the bill, as in the last plea: Held, on special demurrer, that the two last replications were argumentative denials of the allegation in the pleas that S. was the holder of the bill, and that replications should have concluded with *absque hoc* that S. was the holder of the bill. *Kemp v. Watt*, 4 D. & L. 21.

2. *Double pleading* — *Pleas in bar and further maintenance.* — The court refused to allow a defendant to plead a plea in bar of the further maintenance of the action, together with a plea in bar of the action generally. *Suckling v. Wilson*, 4 D. & L. 167.

3. *Issuable plea.* — A plea framed to raise the question, whether the action is not rendered unmaintainable by reason of the non-performance of an alleged condition precedent, is an issuable plea. *Zulueta v. Miller*, 4 D. & L. 166; 2 C. B. 895.

4. *Traverse — Divisible allegation.* — To a declaration on a bill of exchange for 120*l.* 5*s.*, the plea was that the plaintiff and defendant accounted together concerning the causes of action in the declaration mentioned, and all other claims and demands then being between the plaintiff and defendant; that on such accounting, the sum of 50*l.* was found due from the defendant to the plaintiff, and that that sum was paid by the former and received by the latter in satisfaction. The plaintiff replied that he and the defendant did not account concerning the causes of action in the declaration mentioned, and all other claims and demands between them. The defendant demurred specially, on the ground that the traverse taken was too large. The court held the traverse good, as the allegation of accounting in the declaration was not divisible. *Sutton v. Page*, 4 D. & L. 171.

5. *Uncertainty.* — To assumpsit by drawer against acceptor of a bill of exchange, with counts for money lent, &c., the defendant pleaded, first, that he was employed by G. & Co. to engrave a certain print for the sum of 1200*l.*, and that G. & Co. had agreed to pay him on account of the said engraving 40*l.* a month, and thereupon, in

consideration that the defendant, with the assent of G. & Co., and at the request of the plaintiff, would suffer and permit the plaintiff to receive from G. & Co. so much of the said instalments as should amount to the sum of money in the bill specified, the plaintiff agreed to take payment of the bill out of such instalments, and to discharge the defendant from the performance of the promise. The plea then averred that the plaintiff, in pursuance of the agreement, received of G. & Co. 40*l.*, being the first instalment; and although another instalment was due, and the same was sufficient to satisfy the residue of the bill, the plaintiff of his own wrong omitted to obtain and procure it from G. & Co. Replication, that in consideration that the defendant, with assent of G. & Co., at the request of the plaintiff, would suffer and permit the plaintiff to receive from G. & Co. so much of the said instalments as should amount to the sum of money in the bill specified, the plaintiff did not agree to take payment of the bill out of such instalments, and to discharge the defendant from the performance of the promise: Held, on special demurrer, that the replication was bad, inasmuch as it was uncertain whether the plaintiff meant to put in issue the consideration or the agreement, or both: Held, that the plea was bad for not showing such an agreement between the three parties, as would give the plaintiff a right of action against G. & Co. *Kemp v. Watt*, 4 D. & L. 21.

And see ASSUMPSIT. BILLS AND NOTES. COVENANT. LANDLORD AND TENANT. MANOR COURT. NEGLIGENCE. QUARE IMPEDIT. SLANDER.

POSSESSION. See TROVER, 1.

POWER. See EJECTMENT, 3.

PRACTICE.—1. *Affidavit sworn before foreign tribunal*.—On motion for liberty to issue a sci. fa. to revive a judgment, the plaintiff's affidavit had been sworn before the president of the civil tribunal, and signature of the plaintiff attested by the mayor and sous prefect of Verdun in France; and the French consul resident here, by affidavit, stated that there was no resident British consul or notary public at Verdun; that the civil tribunal was a recognized court of justice; he also verified the seals attached to the affidavit: the usual order was granted. *Honzelle v. Watson*, 9 Ir. L. R. 40.

2. *Judgment as in case of a nonsuit*.—Where the defendant had become insolvent after action brought, a motion to enter up judgment as in case of a nonsuit was refused with costs, the defendant having refused a stet processus offered out of court. *Doe d. Brennan v. Mullins*, 9 Ir. L. R. 39.

3. *Speedy execution*.—A verdict having passed for the plaintiff at the trial of this cause, which took place in the vacation, the judge granted a certificate for immediate execution; the same day the plaintiff gave notice of taxation of his costs; and on the following day taxed them, signed judgment, and issued execution: Held, on motion to set aside the judgment and subsequent proceedings, that the plaintiff was regular in the course pursued, and that he was not bound to take out

a rule for judgment, or to wait four days before proceeding to sign judgment. *Alexander v. Williams*, 4 D. & L. 132.

4. *Substitution of service*.—In case for libel against three defendants, two of whom resided in England and one here, who was the agent of the other two, the court refused to substitute service on the defendants out of the jurisdiction by a service upon them and on their agent, the co-defendant, in this country. *Waterhouse v. Hatfield*, 9 Ir. L. R. 38.

And see *NISI PRIUS*. *NEW TRIAL*. *SHERIFF*.

PRESENTMENT. See *BILL OF EXCHANGE*.

PRIORITY OF WRITS. See *BANKRUPT*.

PROCESS.—*Summons*—*Distringas*—*Continuation of process*.—A writ of distringas may issue within a reasonable time after the expiration of a previous writ of summons. *Peyton v. Wood*, 4 D. & L. 19.

And see *AMENDMENT*.

PUBLICATION. See *COPYRIGHT*.

PROMISE OF MARRIAGE. See *ASSUMPSIT*, 1.

PROVISIONAL COMMITTEE. See *RAILWAY COMPANY*, 3.

QUANTUM MERUIT. See *SERVICES*, 2.

QUARE IMPEDIT.—*Demurrer*—*Pleading*.—In a declaration in quare impedit, the plaintiffs set out as the commencement of title letters-patent of the 6th of April, 1662, whereby King Charles the Second granted unto Richard, the sixth Earl of C., and his heirs, inter alia, the advowson of K., habendum to the use of C. and the Lord M., his heirs and assigns, until the said Richard or his heirs should pay to the said Lord M., his heirs or assigns, the several sums in said letters-patent specified, at the time and in the manner therein mentioned, which sums the declaration averred had been long since duly paid off and discharged, to wit, on the day and year, and at the place last aforesaid, and from and after due payment of said several sums in form aforesaid, then to the use of said Richard, and his heirs male, &c. The declaration then stated, that by the act of settlement (14 & 15 Car. 2,) it was enacted that all houses, castles, &c., and other hereditaments whatsoever granted by said patent, should be immediately vested, settled and established, and were thereby vested, settled and established in the said Richard and his heirs, to and for the uses, &c. expressed and set forth in said patent, saving all manner of persons, &c. other than his said majesty, his heirs and successors, or those claiming under him, and other than such whose estate would have vested in his said majesty by the general scope of said act if the above proviso had not been inserted; and other than such as had held any of the lands, &c. by said patent granted by or under any defeasible estate; and other than such as might claim any right or title thereto in prejudice of any of the uses limited by said patent by descent, or by virtue of any estate in remainder in tail from any of the

late Earls of C. It was then averred that the said Richard, as also his heir William, the 7th Earl, were and continued to be Irish papists until their respective deaths, and that by the act of explanation (17 & 18 Car. 2,) it was enacted, that nothing in the act of settlement or explanation should be understood to give, restore or confirm to any Irish papist any advowson or right of patronage, but that all such should vest, remain and continue in his majesty, his heirs and successors, until the conformity of such papist, and after such conformity should revest in the person so conforming and his heirs. It was then averred that King Charles the Second, being seised of said advowson, did by patent of the 19th of December, 1681, reciting the act of explanation, and that Richard Lord Dunkellin, the eldest son of William the 7th Earl, had renounced the communion of the Church of Rome, and had embraced the Protestant religion, and had thereby put himself in the capacity of obtaining a mark of the said king's favour, grant to the said Lord D. and his heirs, continuing Protestants, inter alia, the said advowson of K. It then averred a presentation of said advowson by said Lord D., which was the presentation relied on: Held, that the words in the act of explanation, providing that the advowsons of Irish papists should remain and continue in the king until conformity, were introduced to retain and preserve that species of property in the crown until the conformity of the Irish papists who had forfeited it, and therefore that it was not competent in Charles the Second to grant the advowson to Lord D., and that consequently the declaration was bad in not having shown a presentation which could be referred to the title relied upon. Held, also, that the declaration was bad in not having shown the payment of the money in the patent specified to Lord M., at the time and in the manner in the patent mentioned to have occurred prior to the grant to Lord D. Held, also, that the declaration was defective, in not having averred that Lord D. was a Protestant, or had conformed at the time of the patent of 1681. The title of the plaintiffs, as stated in the declaration, was a term of 500 years, created by a settlement of 1785, which was not to commence until the determination of a previous term of 300 years, created by a private act, 10 Geo. 3, and the trusts of which term (it was averred) had long since been satisfied, and the said term ceased and determined: Held, that the declaration was bad, in not having shown on which event or events that term was to cease and determine, or that any event or events had occurred upon which the term did cease and determine. Held, that it is competent for a bishop defendant to demur to a declaration in quare impedit, if the case made by the plaintiff is insufficient in point of law. Quære, did the said declaration show that a good title to present to the said vicarage was vested in any person anterior to, or at the time of, the presentation on which the plaintiffs relied. *Winchester (Marquess) v. Killaloe*, 9 Ir. L. R. 107.

RAILWAY COMPANY.—1. *Allotment of shares.*—In an action to recover the amount of deposit money paid on certain railway shares, the prospectus of the railway company setting forth that

120,000 shares would be issued: Held, first, that the allotment of only 58,000 shares was a breach of contract, and that the plaintiff was entitled to recover on that ground; secondly, that if it was agreed that the company should go on with the smaller number of shares, that was virtually a new contract, from which any individual shareholder might withdraw. *Wontner v. Sharp*, 2 C. & K. 273.

2. *Inspection of documents—Parliamentary contract—Subscribers' agreement.*—In an action by an allottee of shares in an abortive railway company against a provisional committee-man to recover back the deposit, the court will order the defendant to allow the plaintiff to inspect and take a copy of the parliamentary contract and subscribers' agreement, if it appear that those documents are in the possession or control of the defendant. *Steadman v. Arden*, 4 D. & L. 16.

3. *Provisional committee.*—In an action against railway provisional committeemen under contracts entered into by the committee: Held, that to render defendants liable, it was necessary not only that they were members of the provisional committee, but that they knew it to be still in operation, and also that the expenses incurred were reasonable and usual. *Barrett v. Blunt*, 2 C. & K. 271.

(See *Reynell v. Lewis and Wyld v. Hopkins*, 15 M. & W. 517; *Com. Law Dig.* vol. vi. N. S. p. 148.)

4. *Scrip—Proof of calling in scrip to be registered.*—In order to prove that scrip has been called in by a joint stock company to be registered under 8 Vict. c. 16, s. 9, it is not sufficient to call the clerk of the brokers who sent them in for that purpose, unless he produce the scrip itself; and semble, that some one from the office of the company itself should be called, to prove that the company did in fact call in the scrip. *Mac Ewen v. Woods*, 2 C. & K. 330.

5. *Shares—Bought note—Stamp.*—A bought note for the purchase of railway shares, signed by the broker of the purchaser, is not a memorandum, letter or agreement, made for or relating to the sale of goods, wares or merchandizes, within the fourth exemption in the Stamp Act, 55 Geo. 3, c. 184. *Knight v. Barber*, 2 C. & K. 333.

READY MONEY. See **PAYMENT.**

REMANET.—*Costs.*—In an action of trespass the defendant pleaded four pleas, upon which issues were joined. The cause was entered for trial at the assizes, and made a remanet. The defendant afterwards obtained an order to amend one of the pleas, and the cause was tried at a subsequent assizes, when a verdict was found for the defendant on the amended plea (which covered the whole cause of action), and for the plaintiff on the other pleas. Held, on motion to review the taxation, that the plaintiff was entitled to the costs of the remanet. *Waller v. Blacklock*, 4 D. & L. 4.

RENEWAL. See **COVENANT**, 2, 3.

REVERSION. See **COVENANT**, 1.

RIGHT TO BEGIN. See **FEME COVERT**, 2. **NISI PRIUS**, 3, 4.

SCRIP. See RAILWAY COMPANY, 4.

SERVICES.—1. *Payment in goods—Special contract.—Pleading.*—Where by the terms of a contract service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service, but must sue on the special contract; but if B. by his own act render the delivery of the goods impossible, A. may sue in debt for the value of the service; so if B. allow the goods to be sold under an execution against him. *Keys v. Harwood*, 2 C. B. 905.

2. *Quantum meruit—Breach of contract.*—In an action for work and labour, where there had been a breach of contract on the part of the plaintiff: Held, that under the common counts he could not recover a quantum meruit, nor prove that his breach of contract arose from the defendant's default. *Kewley v. Stokes*, 2 C. & K. 435.

SHARES. See RAILWAY COMPANY.

SHERIFF.—*Procuring copy of sheriff's notes.*—This court cannot aid a party in obtaining a copy of the notes taken at a trial. An application for a rule that defendant might be furnished with a copy of the notes taken by the judge of the sheriffs of London's Court, on a former trial between the same parties, was refused. *Parkhurst v. Gosden*, 2 C. B. 894.

And see ARREST. BANKRUPT. ESCAPE.

SLANDER.—1. *Meaning of words as understood.*—In an action for slander, the words were "You are a thief, you robbed Mr. L. of 30l." The words were spoken in the hearing of B. and of several strangers. B. knew that the words did not mean to impute felony, but meant to impute that the plaintiff had improperly obtained 30l. from Mr. L. to compromise an action for a distress. Held, that under these circumstances the question to be left to the jury was not what the defendant meant by the words he spoke, but what reasonable men hearing the words would understand by them. Semble also, that if all the persons present when the words were spoken had known that the words did not impute felony, that would have been an answer to the action. *Hankinson v. Bilby*, 2 C. & K. 440.

2. *Pleading—Imputation of Misdemeanor.*—A declaration for slander stated in one count that the plaintiff was guilty of most abominable conversation and public exposure of his naked person, and in another that he was guilty of publicly and indecently exposing and uncovering those parts of his person which ought to be kept covered and concealed: Held, an imputation of an offence punishable as a misdemeanor. *Torbitt v. Clare*, 9 Ir. L. R. 86.

SPECIFICATION. See PATENT.

SPEEDY EXECUTION. See PRACTICE, 3.

STAMP.—1. *Lease—Agreement—Separate agreements on same paper.*—Agreement dated April 14th, 1804, not under seal, between M. and N., that N. shall rent of M. the ferry called D. for 6l. 6s. per

annum, to be paid half-yearly, for which N. is to have the sole use of the ferry and whatever profit may accrue from it for the time he holds the same. "Be it also known that N. has this day bought of M. the great ferry boat for the sum of 20*l.*, of which 5*l.* shall be paid," &c.; instalments of 5*l.* to be paid yearly on April 6th, the first in 1805. Held, 1st, That the instrument, purporting to convey an incorporeal hereditament, was not a lease, because not under seal, and therefore did not require a lease stamp: 2nd, That as an agreement for a lease it was not subjected to duty by the clause of stat. 55 Geo. 3, c. 184, Sched. Part 1, tit. Agreement, exempting agreements for leases under the yearly rent of 5*l.*; for that a duty could not be imposed by implication from this exempting clause: 3rd, That if the rent only were considered, the subject-matter of the agreement was not of the value of 20*l.*, and therefore no stamp was necessary: 4th, That the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct and separate memorandum of a bygone purchase of goods, and, in itself, subject to no stamp duty. *Mayfield v. Robinson*, 7 Q. B. 486.

2. *Separate agreements on same paper.*—A., by written contract, agreed to take a publichouse of S. at a certain rent, and to buy of S. all the beer which should be sold and consumed on the premises, under a penalty of 30*l.* for every barrel bought of any other person; and to quit on six months' notice, under a penalty of 30*l.* per month for holding over. At the end of this instrument was written, "And it is further agreed by O. (who was not previously made party to the contract) that he will hold himself responsible for any amount of money which may become due from A. to S., that is to say, to the amount of 36*l.*" The names of S., O. and A. were subscribed: Held, in an action by S. against O. on the guarantee, that a lease stamp was not sufficient, but that an agreement stamp was necessary in respect of O.'s guarantee for the payment of penalties. *Wharton v. Walton*, 7 Q. B. 474.

And see RAILWAY COMPANY, 5.

STOPPAGE IN TRANSITU. See TROVER, 2.

SUBSCRIBERS' AGREEMENT. See RAILWAY COMPANY, 2.

SUMMONS. See PROCESS.

SURRENDER. See LANDLORD AND TENANT, 2.

SUSPICION. See FALSE IMPRISONMENT.

TRANSCRIPTS. See EVIDENCE, 5.

TRAVERSE. See PLEADING, 4.

TRESPASS. See FALSE IMPRISONMENT. LANDLORD AND TENANT, 7, 8. NISI PRIUS, 1.

TRIAL, WRIT OF.—*Several issues—Waiver.*—A writ of trial directing the issue to be tried where there are several issues joined is

irregular, but if the defendant appears at the trial he waives the irregularity. *Towers v. Turner*, 4 D. & L. 177.

TRINITY COLLEGE, DUBLIN. See MANDAMUS, 2.

TROVER.—1. *Ownership—Damages*.—In an action of trover, where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of the goods to another, and where they were seized upon premises in which the plaintiff's tenancy had expired: Held, 1st, that there was a sufficient possession as against a wrongdoer, without regard to the question of ownership; and, 2dly, that the measure of damages was the value of the plaintiff's real and bona fide interest in the goods, and not the full value. *Cameron v. Wynch*, 2 C. & K. 264.

2. *Stoppage in transitu*.—By the custom of the spirit trade in the city of Dublin, where whiskey is bonded in the queen's stores, the party selling gives to the purchaser certain request notes, on the faith of which the price is paid, and which constitute a sufficient authority to the storehouse keeper to deliver the whiskey to the holder of them. The defendant having sold six puncheons of whiskey to A. B., and having got his acceptance for the amount, hands him six request notes; A. B. sells the same to the plaintiff, giving him the request notes; the plaintiff thereupon takes two puncheons out of the store, and on application for the remainder discovers that the defendant had, on the acceptances of A. B. becoming dishonoured, taken out the remaining four: Held, that trover lay at the suit of the plaintiff for the four puncheons, and that he had such a possession as put an end to the stoppage in transitu. *Croker v. Lawder*, 9 Ir. L. R. 21.

UNCERTAINTY. See PLEADING, 5.

USE AND OCCUPATION. See LANDLORD AND TENANT, 9, 10.

VARIANCE.—*Amendment*.—The enactments for allowing amendments at nisi prius were intended to meet variances arising from mere slips or accidents, and do not extend to a case in which the party has intentionally and designedly framed his pleading in a manner which gives rise to the objection. Thus, if a plaintiff, declaring on a deed, recites it according to what he contends is its legal effect, and the judge should hold that that is not the legal effect of the deed, this would not be such a variance as should be amended at nisi prius. *Bowers v. Nixon*, 2 C. & K. 372.

VENDOR AND PURCHASER. See LANDLORD AND TENANT, 10.

VENUE. See BILLS OF EXCHANGE, 1.

WAIVER. See TRIAL, WRIT OF. WARRANT OF ATTORNEY.

WARRANT OF ATTORNEY.—*Setting aside judgment—Appearance—Irregularity—Laches—Waiver*.—E. gave a warrant of attorney authorizing the attorney to appear for him, receive a declaration in debt, and thereupon confess the action or suffer judg-

ment by nil dicit or otherwise. Judgment was signed and execution issued without any appearance being entered for defendant. *Semble*, per Lord Denman, C. J., that no appearance was necessary: but held, that the omission was at most an irregularity and might be waived by laches; and that it was so waived where the warrant was executed on 5th February, and E. was told at the time that judgment would be entered up forthwith; and judgment was entered up on 6th February, seizure made under a fi. fa. on 24th April, and the goods sold on 2nd May, and the rule to set aside was obtained on 26th May. Though a docket was struck against E. on the 3rd May a fiat issued on 5th May, and assignees were chosen on 22nd May, on whose behalf the rule to set aside was obtained. *Charlesworth v. Ellis*, 7 Q. B. 678.

WITNESS. See EVIDENCE, 6.

WORK AND LABOUR. See SERVICES.

WRITS. See AMENDMENT. TRIAL, WRIT OF.

CRIMINAL AND MAGISTRATES' CASES.

Contained in

7 Q. B. parts 1, 2 and 3.
4 D. & L. part 1.

2 Car. & K. part 2.
9 Ir. L. R. parts 1 and 2.

ABORTION.—*Using means to procure—Woman not pregnant.*
—On the trial of an indictment on the stat. 1 Vict. c. 85, for using an instrument with intent to procure the miscarriage of a woman, it is immaterial whether the woman was actually pregnant or not.—*Reg. v. Goodchild*, 2 C. & K. 293.

ABUSING CHILDREN.—*Abusing female child—Assault.*—*Semble*, that on an indictment for carnally knowing and abusing a female child under the age of ten years, which does not charge any assault, the prisoner cannot be convicted of an assault under the 11th section of the stat. 7 Will. 4 & 1 Vict. c. 85. *Regina v. Hamblet*, 2 C. & K. 341.

ACTION. See VENUE.

AFFIDAVIT. See REMOVAL, 1.

ALLOWANCE OF RATE. See RATING, 3.

APPEAL. See HIGHWAYS, 2, 3. REMOVAL, 1, 2, 3.

APPOINTMENT. See EMBEZZLEMENT, 2.

APPRENTICESHIP.—Lost indenture—Secondary evidence.—

On examination before removing magistrates it was deposed, in order to let in secondary evidence of an indenture of apprenticeship, not parochial, that D. had possession of it after the apprentice's death, and had stated, in answer to inquiry, that she, D., had given it to S., the master of a workhouse in which D. was an inmate; that S. was dead, and S.'s widow had stated, in answer to inquiry, that she had searched S.'s papers, but could not find the indenture, and had given up all the parish papers to an assistant overseer; it was further deposed, that the said assistant overseer stated, in answer to inquiry, that he had examined the papers, but did not recollect seeing the indenture, and had handed over the papers to another assistant overseer; and it was proved that this last had searched for the papers, but could not find the indenture; that the master and matron of a workhouse in which D. (after the inquiry first stated) had died, stated that no papers were found in D.'s possession at her death; that the widow of the attorney who prepared the indenture, stated that her husband's papers were in the possession of P. and that the said papers in P.'s possession were searched, but that the indenture could not be found. On this proof the magistrates received the secondary evidence. On appeal, proof was given as above, and also direct proof of the search of the papers by the widow. On this proof the sessions received the secondary evidence. Held, 1st, that the magistrates and sessions were to judge for themselves whether the proof of bonâ fide search was satisfactory, and that this court would not disturb their conclusion without seeing that it was one which they could not legitimately come to. 2nd, that the conclusion here appeared legitimate in each case, and could not be impeached, as derived in part from hearsay evidence. *Reg. v. The Inhabitants of Kenilworth*, 7 Q. B. 642.

ARTICLES OF THE PEACE.—Power of justices out of sessions to commit.—Articles of the peace were exhibited against A. at the quarter sessions of the county of H., and he was by that court ordered to enter into recognizance before one or more justices of H. to keep the peace for six calendar months thence ensuing. Under the warrant of two justices of H., A. was brought before two justices of the same county, to show cause why he should not enter into the recognizance, and he then refused to do so; whereupon the justices last mentioned committed him to the county gaol for the then residue of six calendar months from the date of the order of quarter sessions, unless in the mean time he should enter into the recognizance. Held, that the justices had no power to commit, and that the prisoner was entitled to be discharged on habeas corpus. *Ashton's case*, 7 Q. B. 169.

ASSAULT. See **ABUSING CHILDREN.** **ROBBERY.**

ATTORNEY. See **FORGERY**, 4.

BAIL.—Manslaughter.—On an application to admit to bail persons charged by a coroner's jury with manslaughter, the court will

exercise a discretion, and if it be satisfied that the offenders will be made amenable to justice, the application will be granted. *Reg. v. Woods*, 9 Ir. L. R. 71.

BANKRUPT.—*Indictment for not surrendering—Venue—Town corporate.*—The felony of not surrendering at a district court to a fiat in bankruptcy, under the stat. 5 & 6 Vict. c. 122, s. 32, is committed at the place where the district court is situate; and an indictment for this offence cannot be sustained in a different county in which the person was a trader, or in which he committed an act of bankruptcy. The stat. 38 Geo. 3, c. 52, s. 2, which relates to the trial of offences in an adjoining county, only applies to cities and towns corporate which are counties of themselves, and not to towns corporate which are not counties of themselves. *Reg. v. Milner*, 2 C. & K. 310.

BASTARD.—*Order of filiation—Application for, by whom to be made.*—An order of filiation under stats. 4 & 5 Will. 4, c. 76, s. 72, and 2 & 3 Vict. c. 85, ss. 1, 3, stated that the application for the order was made by the overseers of a township, but did not show that the township was not included in a union, and had no guardians: Held, on motion by the putative father to quash the order, which had been brought up by certiorari, that the order was bad, as not showing that the overseers were the proper parties to make the application. *Reg. v. David Smith*, 7 Q. B. 543.

BEATING A DEER-KEEPER.—*What constitutes the offence.*—Pulling a deer-keeper to the ground and holding him there while another person escapes, is not a beating of the deer-keeper within the stat. 7 & 8 Geo. 4, c. 29, s. 29. A mere battery is not sufficient to come within this enactment. There must be a beating in the popular sense of the word. *Reg. v. Hale*, 2 C. & K. 326.

BENCH WARRANT.—*To detain till party find sureties to answer indictment—Discharge on undertaking to bring no action.*—A warrant of a judge of Q. B. issued, directed to the governor of a gaol, constables, &c., directing them to apprehend and take a party against whom a bill for a misdemeanour had been found at quarter sessions, "and him safely keep, to the end that he may become bound and find sufficient sureties to answer the indictment, and be further dealt with according to law:" Held a bad warrant, for not directing that the party should be brought before some judge or justice to be bound; and this court discharged the party without imposing the condition that no action should be brought. *Reg. v. Downey*, 7 Q. B. 281.

BIGAMY.—*Indictment, form of—Judgment.*—In an indictment for bigamy under stat. 35 Geo. 4, c. 31, s. 22, averments that the defendant married A. and afterwards feloniously took to wife and was married to C., the said A., his former wife, being then alive, sufficiently charges the offence without any further allegation that the defendant was still married to A. when the alleged offence was committed. Judgment after conviction on such indictment, that the

defendant be transported, &c. to such place as her majesty, with the advice of her privy council, shall think fit to declare and appoint pursuant to the statute in such case made and provided, was held good on writ of error. *Murray v. The Queen*, (in error), 7 Q. B. 700.

BRIDGE COMPANY. See **RATING**, 2.

BURGLARY.—*Dwelling-house.*—On the trial for an indictment for a burglary, it appeared that adjoining to the prosecutor's dwelling-house was a lime-kiln, one end of which was supported by the end wall of the dwelling-house; and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights: Held, that the dairy was not a part of the dwelling-house, and that a burglary could not be committed by breaking into it. *Reg. v. Higgs*, 2 C. & K. 322.

CAPTION OF DEPOSITIONS. See **MURDER**, 1.

CENTRAL CRIMINAL COURT. See **JURISDICTION**.

CERTAINTY. See **REMOVAL**, 8, 9, 10.

CERTIFICATE OF MARRIAGE. See **FORGERY**, 5.

CERTIORARI.—*Notice to justices of intention to apply for.*—Appellants against an order of removal served on respondents an order of sessions quashing the order of removal. The order of sessions appeared by the caption to be made at sessions holden before B., J., M., and other their sociates, justices assigned, &c. in the county. The respondents obtained a rule nisi for a certiorari on affidavit of notice to B. and J., the affidavit stating that B. and J. were two of the justices present at the sessions, and two of the same justices whose names appeared in the caption. The notice was signed A. and H., attorneys for the inhabitants of the said parish of S. (the respondent parish); and another of the affidavits on which the rule was obtained stated that A. and H. "were retained and employed by and on behalf of the inhabitants of the parish of S. in the prosecuting and conducting an appeal," &c. (describing the respondents and the order of removal): Held sufficient evidence of service upon and by the proper parties under stat. 13 G. 2, c. 18, s. 5, in default of evidence to the contrary. *Reg. v. The Inhabitants of Sevenoaks*, 7 Q. B. 136.

And see **EXCISE**, 1, 2.

CHARGEABILITY. See **REMOVAL**, 4, 5, 6.

COMMENCEMENT OF PROSECUTION. See **POACHING**.

COMMITMENT. See **ARTICLES OF THE PEACE**.

COMPLAINT. See **REMOVAL**, 12, 13.

CONCLUSION. See **INDICTMENT**.

CONVICTION. See EVIDENCE, 2. EXCISE, 1, 2. HIGHWAY, 2. WORSTED ACT, 1.

CORONER.—*Deputy coroner—Lawful absence of coroner, stat. 6 & 7 Vict. c. 83, s. 1—Signature of inquisition by deputy.*—Under stat. 6 & 7 Vict. c. 83, s. 1, it is a “lawful or reasonable cause” for the absence of the coroner, and the acting of his deputy on an inquest, that the coroner was engaged in holding another inquest. Where the jury are sworn and the inquest commences properly before the deputy, he should continue holding the inquest to its conclusion, although in the course of it the principal coroner may be accidentally present. This inquisition held by the deputy is properly described as taken before the principal coroner; and it is properly signed in the name of the principal coroner, “by E. M., his deputy.” *Reg. v. Perkin*, 7 Q. B. 165.

2. *Habeas corpus to bring before coroner prisoner charged with murder.*—Where a prisoner is committed for trial under a magistrate’s warrant on a charge of murder, *quære* whether this court can grant a writ of habeas corpus to bring him before the coroner sitting upon the body of the deceased. *Semble*, per Coleridge, J., that they can; such power can at any rate be exercised only where a case of necessity is shown. And this court refused the writ where the ground suggested was that the party charged was to be identified before the coroner, and it was not shown that such identification could not be effected without producing the party. *In re Cook*, 7 Q. B. 653.

3. *Jurisdiction of coroner—Inquisition—Manslaughter.*—In a case of manslaughter the cause of the death and the death occurred in the county of S., and the body after death was removed to the city of L.; the coroner of L. held the inquest, and J. E. was tried for the manslaughter on the inquisition. *Semble*, that the inquest was properly held under the stat. 6 & 7 Vict. c. 12, although that statute is a little obscurely worded. *Reg. v. Ellis*, 2 C. & K. 670.

COSTS. See HIGHWAY, 1. ORDER, 3.

COUNSEL. See QUEEN’S COUNSEL.

CRIMINAL INFORMATION. See QUEEN’S COUNSEL.

DEPOSITIONS.—1. *Mode of taking—Practice.*—On a charge of felony the witnesses who make the depositions on which the prisoner is committed should be examined in the prisoner’s presence, and he should hear all the questions put and answered; and if the magistrate’s clerk, before the arrival of the magistrates and the prisoner, examine the witnesses, and take down what they state, and when the magistrates and prisoner arrive the depositions so taken are read over to the witnesses in the presence of the magistrates and the prisoner, and the latter be asked whether he has any question to put to any of them, this is wrong. *Reg. v. Jackson*, 2 C. & K. 394.

2. *Same.*—It would be always desirable when a person of weak intellect is examined before a magistrate in a case of felony, that the

magistrate's clerk should take down in depositions the questions put by the magistrate, and the answers given by the witness, as to the witness's capacity to take an oath. *Reg. v. Painter*, 2 C. & K. 319. And see MURDER, 1.

DEPUTY. See CORONER, 1.

DISTRESS-WARRANT. See RATING, 2.

DOCK DUE. See RATING, 1.

DUPLICITY. See EXCISE, 1.

DWELLING-HOUSE. See BURGLARY.

EMANCIPATION. See REMOVAL, 2. SETTLEMENT, 4.

EMBEZZLEMENT.—1. *Selling at under price*.—A. a brewer sent his drayman B. out with porter, with authority to sell it at fixed prices only, B. sold some of it to C. at an under price, and did not receive the money at the time. A. heard of this and, unknown to B., told C. to pay B. the amount, which C. did, and B., when asked for it by A., denied the receipt of the money: Held to be sufficient evidence of embezzlement. *Reg. v. Aston*, 2 C. & K. 413.

2. *Treasurer to guardians of poor under a local act—Appointment—Stamp*.—The treasurer to the guardians of the poor at Birmingham appointed under the statute 1 & 2 Will. 4, c. 57, (local and personal) is a servant of the guardians, and as such is indictable for embezzlement. The appointment in writing of a person to be such treasurer, at a yearly salary, requires a stamp. But if such appointment be not receivable in evidence for want of a stamp, a recital in a bond executed by him is sufficient evidence of his appointment, and his duties may be shown from the clauses of the local act of parliament under which he is appointed. *Reg. v. Welch*, 2 C. & K. 296.

ERROR. See LARCENY, 3. RECORD.

EVIDENCE.—1. *Proof of another felony*.—Although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. A. was indicted for wilfully setting fire to a rick by firing a gun close to it on the 29th of March: Held, that evidence that the rick was also on fire on the 28th of March, and that the prisoner was then close to it, having a gun in his hand, is receivable to show that the fire on the 29th was not accidental. *Reg. v. Dossett*, 2 C. & K. 306.

2. *Proof of a sentence at the assizes*.—The proper proof that a prisoner was in lawful custody under a sentence of imprisonment passed at the assizes is by the proof of the record of his own conviction; and neither the production of the calendar of the sentences, signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *Reg. v. Bourdon*, 2 C. & K. 366.

And see EXCISE, 1. MURDER, 2. SETTLEMENT, 1, 2, 3.

EXAMINATIONS. See REMOVAL, 8, 9, 10, 11.

EXCISE.—1. Certiorari—Conviction—Duplicity—Return—Evidence.—Where an information charged that a party did knowingly harbour and conceal, and also did knowingly permit and suffer to be harboured and concealed, certain contraband articles, and the conviction thereon adjudged him guilty of the offence so charged: Held, that this information did not charge two offences, and that there was no duplicity in the conviction. In a return to a certiorari removing a conviction under the excise laws, the evidence on which that conviction was founded need not be stated; but if set forth on the face of the return, and the court consider it insufficient to sustain the conviction, the conviction will be quashed. *Reg. v. M^c Naghten*, 9 Ir. L. R. 93.

2. Certiorari—Malt duties—Information.—An information being exhibited before a magistrate against two parties, under the statute 1 & 2 Will. 4, c. 55, s. 5, for that they did keep a certain mill, and did permit to be received into it certain malt, the duties of which had not been paid; and the evidence adduced to support the information having proved that the mill was the property and kept by one of the two parties only, the magistrate dismissed the case. On certiorari in the Court of Queen's Bench: Held, that the information was not supported by the evidence, and that the decision of the magistrate was correct. *Reg. v. M^c Cullion*, 9 Ir. L. R. 27.

FELON. See WITNESS.

FELONIOUS INTENT. See POST OFFICE, 2.

FORGERY.—1. Intent to defraud.—In a case of forgery it is not required, to constitute, in point of law, an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the forgery. A. was indicted for forging and uttering a deed of transfer of ten shares in the London and Croydon Railway Company, with three intents, viz., to defraud that company, D. L., and W. B. It appeared that in July, 1845, E. R. transferred by two deeds of transfer 100 shares in this company to D. L., and that these deeds purported to be executed by D. L. as transferee, but the signatures D. L. were in fact written by A. without the authority or knowledge of D. L. On the 2nd of August, 1845, by seven deeds of transfer, which purported to be executed by D. L. as transferor, these shares were transferred to five different persons, and by one of them two of the shares purported to be transferred to W. B. The name of D. L. was signed to all these deeds by A. without the authority or knowledge of D. L. On these seven transfers there was a profit, which D. L. refused to receive from A., and it did not appear that any further call on these shares could be made: Held, that on these facts A. was entitled to be acquitted, as neither the

company nor D. L. nor W. B. could be defrauded. — E. W. comes to a banking house and asked to have a bill discounted, stating that he came from Mr. Tomlinson (who was known to the banker's clerk) and on one of the bankers saying that Mr. Tomlinson had not indorsed the bill, E. W. said that he could indorse it for him, the banker then wrote on the back of the bill per procuracion, Thomas Tomlinson, and the prisoner signed his own name E. W. to it: Held not to be forgery. *Reg. v. White*, 2 C. & K. 404.

3. *Undertaking for the payment of money.* — A forged instrument by which the supposed maker of it, in consideration of goods to be sold to R. P., undertakes to guarantee to the vendor the due payment for all such goods so to be sold to R. P., but so that the supposed maker should not be liable beyond 10*l.*, is a forged note-taking for the payment of money. — *Reg. v. Stone*, 2 C. & K. 364.

4. *Uttering—Attorney.* — Privileged communication. — The wife of A. went to B., an attorney, and produced a forged will to him, and asked him to advance money to A., or in any way acting as B. was not then the attorney of A., or in any way acting as B. solicitor. A.'s wife left the forged will with B., who made a copy of it. A. afterwards called on B., who told A. all that had occurred and returned him the forged will, declining to advance any money. Held, that the conversation between A.'s wife and B. was not a privileged communication, and that on the trial of A. for forgery evidence might be given of it; and also that the copy of the forged will made by B. might be given in evidence, notice having been given to A. to produce the original. *Reg. v. Farley*, 2 C. & K. 352.

5. *Uttering—Forged certificate of a pretended marriage.* — If A. give to B. a forged certificate of a pretended marriage between A. and B., in order that B. may give it to a third party, A. is guilty of an uttering. — *Reg. v. Farley*, 2 C. & K. 352.

6. *Uttering—Forged certificate of a pretended marriage.* — If A. give to B. a forged certificate of a pretended marriage between A. and B., in order that B. may give it to a third party, A. is guilty of an uttering. — *Reg. v. Farley*, 2 C. & K. 352.

GRAND JURORS. — See RECORD.
GROUNDS OF APPEAL. — See REMOVAL, 2, 3.
HABEAS CORPUS. — See CORNER, 2.

HIGHWAYS. — 1. *Penalty for an indictment—Coroner.* — If a coroner return an indictment against a parish officer for a highway offence, and the defendant is convicted, the coroner is liable to pay the costs of the prosecution. — *Reg. v. Farley*, 2 C. & K. 352.

2. *Penalty for an indictment—Coroner.* — If a coroner return an indictment against a parish officer for a highway offence, and the defendant is convicted, the coroner is liable to pay the costs of the prosecution. — *Reg. v. Farley*, 2 C. & K. 352.

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8. *Time for appealing against order upon surveyor of highways under stat. 4 & 5 Vict. c. 59, s. 3.*—Where a statute empowers justices, on information laid at special sessions, to make orders on specified parties for the payment of money, notice of the intended information being first given to such parties, and empowers them to appeal, giving notice of such appeal "within six days after such order shall be made or given," the time for notice of appeal runs from the making of the order, not from the service. So held on appeal under sect. 3 of stat. 4 & 5 Vict. c. 59, against an order of justices under sect. 1, requiring a surveyor of highways to pay money out of the highway rates in aid of the turnpike funds. *Reg. v. The Justices of Derbyshire*, 7 Q. B. 193.

INDICTMENT.—*Conclusion of—Contra formam statuti.*—Statute 7 & 8 Geo. 4, c. 29, s. 25, enacts "that if any person shall steal any horse, mare," &c. "or shall wilfully kill any of such cattle, with intent to steal the carcase," &c. "every such offender shall be guilty of felony," and on conviction suffer death. Statute 2 & 3 Will. 4, c. 62, s. 1, reduces the punishment to transportation for life; and statute 7 Will. 4 & 1 Vict. c. 90, s. 1, to transportation for not less than ten nor more than fifteen years. An indictment charged defendant with feloniously stealing a mare, saddle and bridle, and did not conclude *contra formam statuti*. A general verdict of guilty was found: Held, that as stealing the mare, as well as stealing the saddle and bridle, was a felony at common law, and not created or altered in its nature by statute, the offence was correctly described in the indictment, and the statutable punishment of fifteen years' transportation would attach to the stealing the mare. *Williams v. The Queen*, 7 Q. B. 250.

And see **BIGAMY**. **HIGHWAYS**, 1. **LARCENY**, 1, 2. **MAN-SLAUGHTER**, 1, 2, 4. **ORDER**, 3. **RECORD**. **THREATENING LETTER**.

INDORSEMENT PER PROCURATION. See **FORGERY**, 2.

INFORMATION. See **EXCISE**, 1, 2.

INQUISITION. See **CORONER**, 3.

INTENT. See **EVIDENCE**, 1. **FORGERY**, 1.

JURISDICTION.—*Of Central Criminal Court—Of Court of Queen's Bench—Recognizances under stat. 4 & 5 Will. 4, c. 36, s. 13—Venue.*—In a prosecution at the Central Criminal Court for publishing a libel, it is not necessary, for the purpose of giving jurisdiction, that the prosecutor should have entered into recognizance, or that the defendant should have been in custody, or be bound to appear, according to sect. 13 of statute 4 & 5 Will. 4, c. 36. In the margin of an indictment for publishing a libel, the venue was "Central Criminal Court to wit;" in the body, the offence was laid to have been committed "at the parish of St. Mary-le-Strand, in the county of Middlesex, within the jurisdiction of the Central Criminal Court:" Held, that the bill was properly found by the grand jury of

the Central Criminal Court, and on certiorari might be removed to the Court of Queen's Bench at Westminster, and judgment be pronounced by this court, on the defendant there withdrawing his plea of not guilty. *Reg. v. Gregory*, 7 Q. B. 274.

And see CORONER, 3. REMOVAL, 12, 13.

LARCENY.—1. *Indictment—Principal.*—J. had employed M. to load sacks of oats, the property of J., from a vessel on to the trams of K., who was to carry them on the trams to the warehouse of J. By previous concert between M. and K. oats were taken by M. from two of the sacks, and put into a nose bag in the absence of K., and hidden under a tram. K. returned in a few minutes, and took the nose bag and its contents from under the tram, and took them away, M. being then within three or four yards of him: Held, that both were principals in the larceny, and that K. was not a receiver; and that as it was all one transaction, and both had concurred in it, and both had been present at some part of the transaction, both could be convicted as principal in the larceny. *Reg. v. Kelly*, 2 C. & K. 379.

2. *Indictment—Property—Poor box in church.*—Money was stolen from an ancient poor's box fixed up in a church: Held, that in an indictment for stealing it, the property would be properly laid in the vicar and churchwardens, and that an indictment in which the property was stated to be that of J. N. and others, J. N. being the vicar, was correct, without alleging J. N. to be vicar or the others to be the churchwardens. *Reg. v. Wortley*, 2 C. & K. 283.

3. *In dwelling-house to the value of 5l.—Erroneous sentence—Transportation for seven years.*—Under stat. 7 Will. 4 & 1 Vict. c. 90, which enacts that persons convicted of stealing in a dwelling-house to the value of 5l. shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, judgment before stat. 9 & 10 Vict. c. 24, of transportation for seven years was reversed on writ of error.—*Whitehead v. The Queen*, 7 Q. B. 582.

4. *Servant.*—Where a servant received money from his master, in order to pay the wages of certain workpeople therewith, and in the book in which the account of the money so paid was kept by the servant entries were found charging the master with more money than the servant had actually disbursed; but there was no proof that he had ever delivered this account to his master: Held, that this did not amount to larceny in the servant. *Reg. v. Butler*, 2 C. & K. 340.

And see POST OFFICE, 1, 2.

LETTER. See POST OFFICE, 1.

LEGITIMACY. See REMOVAL, 11.

LIBEL. See QUEEN'S COUNSEL.

LICENSE TO PLEAD. See QUEEN'S COUNSEL.

LOST INDENTURE. See APPRENTICESHIP.

MALT DUTIES. See EXCISE, 2.

MANDAMUS. See RATING, 2.

MANSLAUGHTER.—1. Indictment against medical practitioner.—An indictment against a medical practitioner charged that he made divers assaults on the deceased (a patient), and applied wet cloths to his body, and caused him to be put into baths: Held, that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased, and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. *Reg. v. Ellis*, 2 C. & K. 470.

2. Indictment — Cause of death. — An indictment for manslaughter charged that J. E. caused R. D. to become mortally sick, of which mortal sickness, especially of a mortal congestion of the lungs and heart, occasioned by the means aforesaid, he died: Held, that this properly charged a death from a mortal congestion caused by those means. *S. C. ib.*

3. Negligence—Ventilation of a mine.—If it be the duty of a person as ground bailiff of a mine to cause the mine to be properly ventilated by causing air-headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire-damp, such person is guilty of manslaughter, if, by such his omission, he was guilty of a want of ordinary and reasonable precaution, and if it was his plain and ordinary duty to have caused an air-heading to be made, and a man using reasonable diligence would have done it. It is no defence in a case of manslaughter that the death of the deceased was caused by the negligence of others as well as by that of the prisoner; for if the death of a deceased be caused partly by the negligence of the prisoner and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter. *Reg. v. Haines*, 2 C. & K. 368.

4. Negligence—Ventilation of a mine—Indictment.—Where an engineer who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine neglected his duty, so that the engine stopped, and the mine thereby became charged with foul air, which afterwards exploded and caused the death of one of the miners: Held, that in such a case the engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform. *Reg. v. Barrett*, 2 C. & K. 343.

And see **BAIL. CORONER, 3.**

MURDER.—1. Depositions—Caption.—In order to make the depositions of a deceased witness admissible in evidence against a prisoner charged with felony, such deposition need not have a separate caption. If there be a caption at the head of the body of depositions taken in the case, that is sufficient. *Reg. v. Johnson*, 2 C. & K. 334.

2. Evidence—Statements made by deceased.—On a trial for murder by poisoning, statements made by the deceased in conversation shortly before the time at which the poison is supposed to have been administered, are evidence to prove the state of his health at that time. *S. C. ib.*

3. Postponing trial.—An application to postpone the trial of a prisoner charged with murder, in order to afford an opportunity of investigating the evidence and characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the accused on the life of the deceased, was refused. *S. C. ib.*

NEGLIGENCE. See **MANSLAUGHTER**, 3, 4.

NIGHT POACHING. See **POACHING**.

NOTICE OF APPEAL. See **HIGHWAYS**, 2.

NOTICE OF APPLICATION. See **CERTIORARI**.

NOTICE TO PRODUCE. See **ORDER**, 3. **SUBPENA**, 2.

ORDER.—1. *Of justices—Seal.*—It is not necessary that an order of justices should be sealed with wax; an impression made in ink with a wooden block, in the usual place of a seal, is sufficient, when the document purports to be given under the hands and seals of the justices, and is in fact signed and delivered by them. *Reg. v. St. Paul, Covent Garden*, 7 Q. B. 232.

2. *Of justices—Signature by initials.*—An order of removal purported to be made by two justices for the jurisdiction, but did not set forth their names in full: in signing the order one justice abbreviated his Christian name, and the other signed by an initial only. The examination on which the order was made purported, by its caption, to have been taken by two justices for the jurisdiction, and the jurat was sworn before us, the said justices, and was signed in the same manner as the order: Held, in each case, that the signatures were sufficient. *Reg. v. The Inhabitants of Worthenbury*, 7 Q. B. 555.

3. *Of sessions for payment of costs—What is original order—Service to ground indictment for disobedience—Notice to produce—Taxation—Completing order for costs at adjourned session—Objection cured by implied consent.*—An order of quarter sessions, on dismissal of an appeal against a poor-rate, that the appellant shall pay costs "immediately upon service of this order, or a true copy thereof," is valid; for the order is a judgment of the sessions, and therefore service of the original, or production of it on service of a copy, cannot be required. On indictment for disobeying such order, with an averment that a true copy of the order was served on defendants, and they had notice of the said order and of the contents thereof, the prosecutors produced in court the minute book of quarter sessions in which the order was entered, and a copy of the order on parchment, which was an authentic extract of the minutes; and they offered parol evidence that a true copy of the order was served on the defendants, and the contents of the parchment at the same time read over to them: Held, that (whether the parchment was an original or not) parol evidence as to the copy served was admissible, without notice to the defendants to produce the copy itself; for the object of the evidence was only to prove notice of the order, which notice the copy was, and therefore notice to produce it was unneces-

sary. The order for costs was made at first without stating the amount, which was left to be ascertained by the clerk of the peace, the justices then adjourned; the costs were taxed, and the amount verbally reported by the clerk of the peace at the adjourned sitting, which was not attended by all the magistrates originally present. The order was there finally drawn up, with the amount of costs as taxed. *Quære*, by Coleridge, J., whether the justices at the adjourned sitting had jurisdiction to settle the costs. But evidence having been given on the trial of the indictment that both appellants and respondents had an opportunity of attending the taxation, and knew of the proceedings at the adjourned session, and took no objection: Held, on motion, after a verdict of guilty, for a new trial or to enter a verdict for defendants, that the irregularity, if any, was no ground for disturbing the verdict. *Reg. v. Mortlock*, 7 Q. B. 459.

And see **BASTARD. RELIEF. REMOVAL**, 12, 13.

PARDON.—*Certificate of discharge from hulks in respect to one offence, no bar to an indictment for another offence previously committed.*—A. was at the Spring Assizes of 1846 indicted for stealing a horse on the 26th February, 1841; he had in 1842 been convicted of felony and sent to the hulks, from which he was discharged in February, 1846. He produced a certificate of his discharge, which stated that S. H., who was convicted at Worcester on the 22nd of June, 1842, is this day discharged, in consequence of having received a free pardon: Held, that if this pardon had been regularly proved, it would have been no bar to the charge of horse-stealing, as the pardon was expressly confined to another felony. *Reg. v. Harrod*, 2 C. & K. 294.

PARISH OFFICER. See **SUBPENA**, 1, 2.

PENALTIES. See **WORSTED ACT**, 2.

POACHING.—*Night poaching—Commencement of the prosecution.*—In a case of night poaching by persons armed, the offence was committed on the 4th of December, 1845; on the 19th of December information of the offence was made before a magistrate, who on that day granted a warrant to apprehend A. and B., two of the offenders. On one of these warrants A. was apprehended, and committed for trial on the 16th September, 1846; B. being apprehended on the other warrant, and committed for trial on the 21st of October, 1846. The indictment was preferred and found on the 5th of April, 1847: Held, that the prosecution was commenced within twelve calendar months after the commission of the offence, and that it was commenced by the information and warrants to apprehend, or at all events by the apprehension of the prisoners. *Reg. v. Brooks*, 2 C. & K. 402.

POOR-BOX. See **LARCENY**, 2.

POST-OFFICE.—1. *Larceny by servant of the post-office—Post letter.*—The president of a department in the post-office put a half sovereign into a letter on which he wrote a fictitious address,

and dropped the letter with the money into the letter box of a post-office receiving house, where this prisoner was employed in the service of the post-office. The prisoner stole the letter and money: Held, that this was a stealing of a post letter, containing money, within the stat. 1 Vict. c. 36, s. 26, and that this was not the less a post letter within that enactment because it had a fictitious address. *Reg. v. Young*, 2 C. & K. 466.

2. *Larceny by servant of the post-office—Taking—Felonious intent.*—S. delivered two 5*l.* notes to Mrs. D., the wife of the post-master of C., at which post-office money orders were not granted, and asked her to send them by G., the letter-carrier from C. to W., in order that he might get two 5*l.* money orders at the W. post-office; Mr. D. gave these instructions to G., and put the notes by his desire into his bag. G. afterwards took the notes out of the bag, and pretended when he had got to the W. post-office that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D.: Held, by the fifteen judges, that this taking of the notes by G. was not a larceny, the notes not being in his possession in the course of his duty as a post-office servant. *Reg. v. Glass*, 2 C. & K. 395.

POSTPONING TRIAL. See MURDER, 3.

PRACTICE. See DEPOSITIONS, 1, 2.

PRINCIPAL. See LARCENY, 1.

PRIOR ORDER. See SETTLEMENT, 1, 2, 3.

PRIVILEGED COMMUNICATION. See FORGERY, 4.

PROCURING ABORTION. See ABORTION.

PRODUCTION OF DOCUMENTS. See SUBPŒNA, 1, 2.

PROPERTY. See LARCENY, 2.

PUNISHMENT. See LARCENY, 3.

QUEEN'S COUNSEL.—*Licence to plead—Criminal information for libel.*—On the trial of a criminal information, a queen's counsel ought not to be of counsel for the defendant without a licence from the queen, or at least a letter from the secretary of state; and it is not enough that an application for a licence has been sent to the secretary of state from an assize town in the country, to which no answer has been received at the time of the case being tried. *Reg. v. Bartlett*, 2 C. & K. 321.

RAPE.—*Practice—View in a case of felony.*—Where, on the trial of a case of rape, it was wished on the part of the prisoner that the jury should see the place where the offence was said to have been committed, and the place was so near to the court that the jury could have a view without inconvenience, the judge allowed a view, although the prosecutor did not consent to it. *Reg. v. Whalley*, 2 C. & K. 376.

RATING.—1. *Dock dues, rateability of.*—By stat. 14 Geo. 3,

c. 56, s. 15, the Hull Dock Company were empowered and required, within seven years from December 31st, 1774, to make a basin or dock at Kingston-upon-Hull, with reservoirs, sluices, bridges, roads, &c.; by sect. 18 certain lands of the crown were granted to them for that purpose, and sect. 42 enacted that, in consideration of the expense the company would be at in making and keeping in repair such dock, &c. there should be payable, from and after December 31st, 1774, to the company, for every ship, &c. "coming into or going out of the said harbour, basin or docks, within the port of Kingston-upon-Hull," or unloading or putting on shore, or lading or taking on board, any of their cargo, or any goods, within the said port, certain duties of tonnage (according to the full of the reach and burthen), to be paid at the time of the ship's entry inwards or clearance outwards; or in case any ship should not enter as aforesaid, then at any time before such ship should proceed from the said port at the custom-house in the said port. The company, according to the statute, made a dock in the parish of T. communicating with the harbour or river Hull and the river Humber. The dock is in their own land, granted as above. They have no right of property in the harbour, and occupy nothing on the shore of the Humber, except the entrance basin of the dock. The port of Hull (in the popular sense, adopted in this case) includes the Humber to the mid stream, and all ships using the dock pass through this portion of the Humber. Some discharge and load their cargoes in the Humber or the harbour, without using the dock or entering upon any property of the company, but these, as well as the ships entering the dock, pay the tonnage duties: Held, on appeal against a poor rate for the parish of T., 1. Even assuming that the word "harbour," in sect. 42, was synonymous with "port," so that the duties attached on all ships entering the port, whether they came into the dock or not, still that the company were rateable for the duties on ships which actually did enter the dock, those duties being profits of the company's land in T. accruing there. But 2. That they were not rateable in T. for the dock in respect of duties which were paid by ships not entering or using it. *Reg. v. Hull Dock Company*, 7 Q. B. 2.

2. *Mandamus to issue distress warrant—Liability of shareholder in a bridge to poor rate.*—Commissioners were appointed by statute for building a bridge, the tolls to be vested in them, with power to contract for the building and repairs, and to convey the tolls to the parties with whom they contracted, charged with certain payments. The commissioners contracted accordingly with certain subscribers, who agreed to build and repair the bridge, and the commissioners agreed, when the bridge should be built, to convey over in perpetuity all the tolls, &c. to the subscribers, their executors, &c. to hold as tenants in common, and not as joint tenants, or as such subscribers should appoint. The bridge being built, the commissioners by indenture reciting the contract assigned to the trustees in fee the bridge and tolls, upon trust to permit and suffer the subscribers, their heirs and assigns, to take the tolls, and to have the sole management

thereof, and to appoint receivers, &c. on condition that the subscribers should make certain annual and other payments, keep the bridge in repair, pay salaries, &c., and should, in the last place, yearly for ever share all the residue of the tolls, &c. among the subscribers for the time being, and their respective heirs and assigns, proportionably to their several shares and interests as tenants in common, and not as joint tenants. Proviso, that if the trustees, their heirs and assigns, should adjudge that the subscribers had made default in the payments, &c. they should not, during such default, be permitted to receive or solely manage the tolls, but the trustees should receive and manage the same, and do whatever the subscribers were required to do. The subscribers entered into receipt of the tolls, which were taken in part at a toll-house at one end of the bridge, in the parish of Putney. H. C. was proprietor of a small share, and was clerk to the subscribers, but was not appointed to represent them in any other way, nor was he an inhabitant of Putney. In a poor rate for that parish he and many other persons were assessed together as owners and occupiers of part of the bridge, which was situate in Putney. H. C. did not appeal, and being summoned before a justice of one of the metropolitan police courts, disputed his liability, and contended that some persons were improperly inserted in the assessment, and (as that fact was) that some proprietors were omitted, the justice declined issuing a distress warrant. This court granted a mandamus, calling upon the justice to issue such warrant: Held, by Lord Denman, C. J., and Patteson, J., that H. C. might be distrained upon for the rate, and must obtain contributions as he could from the other subscribers. By Williams and Wightman, Js., that H. C. was at all events liable for some portion of the rate, and not having appealed, could not now contend that he was rated for too much, or that other persons were improperly joined with him as subscribers, or omitted. *Reg. v. Paynter*, 7 Q. B. 255.

3. *Notice of rate and allowance.*—In the written notice of a rate, published by the parish officers and proved before the justice, it was stated that the rate had been allowed "by one of her majesty's justices of the peace, acting within the metropolitan district, pursuant to the statute," &c.: Held, that if this did not sufficiently show that the magistrate was one of those authorized by stat. 2 & 3 Vict. c. 71, s. 14, to perform the functions of two justices, the notice of allowance was not therefore void, stat. 17 Geo. 2, c. 3, s. 1, requiring publication of the rate only, and not of the allowance. *S. C.* ib.

RECITAL OF STATUTE. See WORSTED ACT, 2.

RECOGNIZANCES. See JURISDICTION.

RECORD.—*Of indictment—Description of grand jurors.*—A record of conviction at the assizes, beginning, Yorkshire, to wit, and reciting a commission to justices to hear and determine, and deliver the gaol there, and to inquire by the oaths of good and lawful men, within the said county of York, set forth an indictment found by A. B., C. D., &c., grand jurors, giving to each, except in one in-

stance, the addition of his residence, but not stating them to be good and lawful men within the county of York, nor making any mention of the county. On writ of error, assigning as a ground that the indictment did not appear to have been found by good and lawful men of the county, *semble*, per Patteson, J., that the objection was fatal. *Whitehead v. The Queen*, 7 Q. B. 582.

RELIEF.—*Order for relief out of workhouse—Summons to show cause.*—An order of justices, under stat. 4 & 5 Will. 4, c. 76, s. 27, for relieving a pauper elsewhere than in the workhouse, cannot be made without summoning the parties who will be burdened by such order to show cause why it should not be made. Where such relief is to be given in a parish forming part of a union, *quære*, whether the order should be addressed to the overseers or to the guardians. *Quære*, also, whether, in the case of such a parish, the order sufficiently shows jurisdiction, under sect. 27, if the justices only describe themselves as two of her majesty's justices of the peace acting in and for the county of A., and usually acting at B. within the district of the C. poor law union, in which the parish lies in the said county. *Reg. v. The Guardians of the Poor of the Totnes Union*, 7 Q. B. 690.

REMOVAL.—1. *Appeal against order—Entry of jurisdiction of sessions—When parish is aggrieved—Affidavits on information and belief.*—Affidavits showed that an order of removal was made and suspended on 29th July, and that the suspension had never been taken off; that the order was served on the appellants on 7th August, that the appellants on 14th October served on respondents a notice, dated 6th September, stating the intention of appellants, at the next sessions, to enter and try an appeal against the order of removal, in which notice was incorporated a statement of grounds of appeal; that by the practice of the sessions eight days' notice of trial was required; that the next quarter sessions were held 17th October; that no appeal was then prosecuted, or entered and respited, as one of the deponents, respondent's attorney, had been informed and verily believed; that the respondents did not attend at the October sessions, nor at the following Epiphany sessions, and heard nothing more of the appeal until 15th February following, when a document, purporting to be a copy of an order, made on appeal at the Epiphany sessions held on 4th January, for quashing the order of removal, was sent to respondents by the vestry clerk of the appellant parish. A rule for quashing the order of sessions having been obtained on these affidavits, and no affidavits being filed in answer: Held, that the October sessions were the next practicable sessions after the order of removal, and that, if the appeal was not entered and respited at those sessions, the next Epiphany sessions had no jurisdiction to entertain it. Held, also, by Lord Denman, C. J., Williams and Wightman, Js., that the statement of the respondent's attorney in the negative, "as he had been informed and believed," remaining unanswered by the opposite party showed sufficiently that the appeal had not been entered and respited at the October sessions; *dubitante* Patteson, J. Held, also, that the respondents were aggrieved (within the provision of stat. 13 & 14

Car. 2, c. 12, s. 2,) by the order of sessions, and that this court was bound to interfere on their behalf. *Reg. v. The Inhabitants of Seven-oaks*, 7 Q. B. 136.

2. *Appeal, grounds of—Emancipation.*—Grounds of appeal against an order of removal stated a settlement acquired by the pauper's grandfather, and that after the acquisition of that settlement the father was an emancipated member of the grandfather's family, and that neither the pauper nor his father had gained any settlement in their own right: Held sufficient, without enumerating and negating the modes in which the pauper's father might have been emancipated. *Reg. v. The Inhabitants of Rothwell*, 7 Q. B. 574.

3. *Appeal against order, grounds of—Separate and distinct tenement, under stat. 6 Geo. 4, c. 57.*—A statement of grounds of appeal, against an order of removal, alleging a settlement acquired by paying parochial rates, for a tenement consisting of houses, since the passing of 6 Geo. 4, c. 57, must aver that the tenement was "separate and distinct."—*Reg. v. The Inhabitants of Ripon*, 7 Q. B. 225.

4. *Chargeability, notice of.*—In a notice of chargeability the words "has become chargeable" are equivalent to "is chargeable"; per Lord Denman, C. J. *Reg. v. Inhabitants of Stockton*, 7 Q. B. 520.

5. *Chargeability, statement of.*—The pauper, in her examination, stated, "I am unable to maintain myself, and am now residing in, and receiving relief from, and am actually chargeable to" the appellant parish: Held, sufficient evidence of chargeability. *Reg. v. The Inhabitants of Great Bolton*, 7 Q. B. 387.

6. *Same.*—That paupers are receiving relief from, and actually chargeable to, a township which they inhabit is a sufficient averment of chargeability.—*Reg. v. The Inhabitants of Totley*, 7 Q. B. 596.

7. *Documents before removing justices—Sending copies to appellants.*—On application to justices for an order of removal the settlement alleged was an interest in land acquired by the pauper as administrator. The examination stated this interest, and the grant of the letters of administration, with names and dates; and together with the examination there were sent to the appellant parish copies of letters of administration corresponding in names and dates with the letters described in the examination, but the examination did not expressly show that any letters of administration were produced before the justices, nor was any notice given to the appellants of their having been produced: Held, that the examinations were not, on that ground, insufficient; for it must be assumed that the letters sent to the appellant parish were before the justices. *Reg. v. The Inhabitants of St. Anne, Westminster*, 7 Q. B. 245.

8. *Examinations in support of order, certainty in—"In or about."*—In an examination touching the settlement of a bastard child (not shown to have gained any settlement since the birth), a statement that such child was born "in or about 1833" is not sufficiently precise; since under s. 71 of stat. 4 & 5 Will. 4, c. 76, it may be material that the birth should have taken place before August 14,

1834; and the words "in or about" do not exclude the supposition that the child may have been born later. *Reg. v. St. Paul, Covent Garden*, 7 Q. B. 232.

9. *Examination, certainty in—Jurisdiction of sessions.*—An examination touching settlement stated a marriage to have taken place in the church of B. Among the grounds of appeal it was alleged that the examination was defective because there were two churches of B., and this appearing in evidence to be so, the sessions refused to hear the respondents, but stated the facts for the opinion of this court, not submitting any particular question. Order affirmed, the decision being on a point of which the sessions were the sole judges. *Reg. v. The Inhabitants of Bakewell*, 7 Q. B. 601.

10. *Examinations, certainty in—Residence—Settlement by renting tenement—Description of tenement—Parochial place.*—Pauper was removed on examinations showing a maiden settlement of his mother by residence, while unemancipated, with her father, who rented a tenement, No. 3, Hot Bath Street, in the parish of St. James, Bath. They further stated that the pauper's father took a tenement, being No. 8, Hot Bath Street, aforesaid, of the yearly value of 10l., and was legally settled upon, occupied and resided in, the same from March, 1819, for one year and a half: Held, that Hot Bath Street aforesaid could not be taken to mean Hot Bath Street in the parish of St. James, and, therefore, that the father's settlement was not properly ascertained; that the respondents could not avail themselves of the mother's settlement, because it appeared that the father had a settlement which ought to have been inquired into; and that the order was properly quashed at sessions on these defects in the examinations pointed out on grounds of appeal. The court will presume that a place in England is parochial if nothing to the contrary appears. *Reg. v. The Inhabitants of St. Margaret, Westminster*, 7 Q. B. 569.

11. *Examinations—Derivative settlement—Statement of legitimacy.* Paupers were removed to the settlement of G. B., as their father, on an examination, stating that G. B. died on May 1st, 1843, and his wife the previous day, leaving eight children, some of whom were the paupers, and that the said children were residing with their said parents, G. B. and his said wife, until their deaths as aforesaid. On appeal, and objection taken that the examination did not show that the paupers were legitimate, and therefore did not warrant the order of removal, the sessions decided in favour of the appeal, subject to the opinion of the court on the question whether or not the objection was fatal: Held, that the legitimacy appeared sufficiently to warrant the order of removal. Order of sessions quashed. *Semble*, per Lord Denman, C. J., that if the question submitted had been whether or not the examination gave the appellants sufficient materials for inquiry, this court would not have interfered with the decision at sessions. *Reg. v. The Inhabitants of Totley*, 7 Q. B. 596.

12. *Order—Complaint—"Coming to inhabit"—Certiorari.*—An order of removal, made 18th of January, purported to be founded

upon a complaint that the paupers have lately intruded and come into the said parish of G., and have become actually chargeable to the same, and directed them to be removed to B. The first practicable sessions for an appeal were held on the 11th April, and were adjourned to 9th May. No appeal was entered at the sessions in April, but, according to the practice of that court, an appeal entered at the adjourned sitting in May would be in time. The overseers of B. moved for a certiorari on 25th April. Held, that, although the time for appealing had not expired, the overseers of B. might obtain a certiorari, and the order was bad as being founded on a complaint which did not sufficiently allege that the paupers had come to inhabit in G. *Reg. v. Willats*, 7 Q. B. 516.

13. *Order—Marginal venue—"In and for"—Complaint—Jurisdiction.*—An order of removal having the marginal venue borough of K., and commencing upon the complaint of the churchwardens, &c. unto us G. C. and T. F., being two of her majesty's justices of the peace for the said borough of K., does not sufficiently show that the justices heard the complaint within the jurisdiction. The complaint should appear to have been heard by justices in and for, &c. *Reg. v. The Inhabitants of Stockton*, 7 Q. B. 520.

14. *Removal after previous order quashed, subject to a case—Fresh chargeability.*—A pauper was removed, and copies of the order, examinations, &c. sent to the parish to which she was removed; but the copy of the order of removal did not contain the signatures of the removing justices. On this objection, the order of removal was quashed on appeal, subject to a case. The respondents, however, took no step to bring the case up. Afterwards the pauper became again chargeable, having obtained no fresh settlement. Held, that she might (even before the time for obtaining a certiorari to bring up the order of sessions expired) be removed to the same parish as before; for that, 1, the former order was not conclusive as to the merits; and, 2, not proceeding with the case granted on the first appeal did not preclude her removal on a new chargeability. *Reg. v. The Inhabitants of Great Bolton*, 7 Q. B. 387.

15. *Separation of mother and child.*—If a female pauper and her child, within the age of nurture, be removed by order of justices, *quære* whether such order can be enforced if the notice of chargeability does not mention the child as chargeable, and in reciting the order made for removal of the mother does not show that the child is therein named. *Semble*, per Lord Denman, C. J., Patteson and Coleridge, Js., that although the order named the mother only, the parish to which the removal is made must nevertheless receive the child if within the age of nurture and brought with the mother. *Reg. v. The Inhabitants of Stockton*, 7 Q. B. 520.

And see SETTLEMENT, *passim*.

ROBBERY.—*Assault.*—If, on the trial of an indictment for a robbery with violence, the robbery be not proved, the prisoner cannot be found guilty of the assault only (under 7 Will. 4 & 1 Vict. c. 85, s. 11), unless it appear that such assault was committed in the

progress of something, which, when completed, would be felony, and with intent to commit a felony. *Reg. v. Greenwood*, 2 C. & K. 339.

SEALING. See ORDER, 1.

SECONDARY EVIDENCE. See APPRENTICESHIP.

SENDING DOCUMENTS. See REMOVAL, 7.

SENTENCE. See EVIDENCE, 2.

SEPARATE TENEMENT. See REMOVAL, 3.

SEPARATION OF MOTHER AND CHILD. See REMOVAL, 15.

SERVANT. See LARCENY, 4.

SERVICE. See CERTIORARI. ORDER, 3.

SESSIONS. See ORDER, 3. REMOVAL.

SETTLEMENT.—1. *Evidence—Prior order quashed on appeal—Grounds of quashing.*—The sessions, on appeal, quashed an order of removal from P. to L., founded on examinations which stated a settlement by renting and occupying a house in L. for one year, at 22l. a year, and being assessed to the poor rate in L., which the party had paid as the occupier of the said house during his occupation. The ground of appeal was, that the examination was defective, as not stating in what year or years the party rented and occupied, or that the house was rented by him in L., or occupied under a yearly hiring, and the rent to the amount of 10l. actually paid for one whole year at the least, or that such house was actually occupied under a yearly hiring by him, and the rent, &c. paid by him for the same, or that he had been assessed to the poor rate and paid the same in respect of such house for one year. The order of sessions stated the order of removal to be quashed on the ground of the examination disclosing no settlement on the face thereof, and the appellants having given notice thereof in their grounds of appeal. The pauper being removed again from P. to L., it was stated and relied upon as a ground of appeal, that the examinations did not show any settlement acquired since the above order of sessions, and, in fact, no new settlement appeared. The sessions, however, confirmed the new order of removal, subject to a case stating all the circumstances of the former decision, and submitting, as the question for this court, whether or not the former order of sessions was conclusive. Held, that this court, being enabled by the case stated to see that the former order of sessions had disposed of the substantial question, might pronounce that order conclusive, though the sessions, by their last order, had decided the contrary; and the latter order was quashed. *Reg. v. The Inhabitants of St. Mary, Lambeth*, 7 Q. B. 587.

2. *Evidence—Prior order quashed for insufficiency of examinations.*—Appellants against an order of removal objected in their grounds of appeal, that the examination did not properly show the residence necessary to acquiring a settlement, and that other specified

facts were insufficiently alleged; they also denied the settlement at the sessions: this order was, on motion of the said respondents, set aside for insufficiency of examination. Afterwards the respondents again removed the paupers to the appellant township on an examination disclosing substantially the same grounds as before: Held, on appeal against the second order of removal, that the first order of sessions was conclusive between the parties on the point of settlement. *Reg. v. The Inhabitants of Ellel*, 7 Q. B. 593.

3. *Evidence — Prior order unappealed against.* — An order of removal was made on an examination, which showed that the pauper never acquired a settlement for himself, but was emancipated in 1823; that his father was apprentice in L. in 1790, and was removed to L. under an order of removal in 1838, against which L. had not appealed, but had subsequently maintained the father; the examinations did not set forth the circumstances of the apprenticeship so as to prove that the father acquired a settlement after the apprenticeship: Held, that the order unappealed against for the removal of the father was conclusive evidence of the settlement of the son. *Reg. v. The Inhabitants of Brighthelmstone*, 7 Q. B. 549.

4. *Presumption of emancipation.* — A pauper was removed to parish A. on examinations, which showed that he had gained no settlement in his own right, and that when the pauper was twenty-seven years old his father had received relief from parish A. while resident elsewhere: Held sufficient, for that emancipation was not to be presumed, although it was not stated that the pauper, at the time in question, was resident with his father or formed part of his family. *Reg. v. The Inhabitants of Lilleshall*, 7 Q. B. 158.

And see REMOVAL.

SHAREHOLDER. See RATING, 2.

SIGNATURE. See CORONER, 1. ORDER, 2.

STAMP. See EMBEZZLEMENT, 2.

SUBPŒNA. — 1. *Subpœna duces tecum from crown office to attend justices on application for order of removal—Privilege of parish officer producing documents to decline submitting them to examination.*—On an application before magistrates in petty sessions for an order to remove a pauper to parish A., where it is sought to show a settlement by rating, a subpœna ad testificandum and a subpœna duces tecum may issue from the crown office to the parish officer of A., commanding him to attend the examination at petty sessions, give evidence, and produce the parish rate-books; and if he disobeys, this court will grant an attachment. Whether, on attending with the books, he is bound to submit them to examination, *quære*. *Reg. v. Greenaway*, *Reg. v. Carey*, 7 Q. B. 126.

2. *Summons of justice—Production of documents before removing justices how to be enforced.*—The summons of a justice, requiring a party possessed of documents to attend as a witness and produce such documents on the hearing of an application for an order of removal, is not equivalent to a subpœna duces tecum; and secondary evidence

is not admissible on proof that such summons has been served and disobeyed. So held, where the person served was an overseer of the parish, to which it was proposed to remove, and the summons (headed "Summons to witness") was addressed to the overseers, requiring them to produce the rate-books. *Reg. v. Orton*, 7 Q. B. 120.

SURETIES. See **BENCH WARRANT**.

TAKING. See **POST OFFICE**, 2.

TAXATION OF COSTS. See **ORDER**, 3.

THREATENING LETTER.—*Indictment*.—An indictment on the stat. 4 Geo. 4, c. 54, s. 3, charged that the prisoner sent a letter to J. L., threatening to burn the house of J. R.: Held bad, as the threat must be to the owner of the property; and that if the letter was sent to J. L., with intent that it should reach J. R., and did reach him, it should have been charged in the indictment as sent to J. R. *Reg. v. Jones*, 2 C. & K. 398.

TREASURER OF GUARDIANS. See **EMBEZZLEMENT**, 2.

UNDERTAKING FOR PAYMENT OF MONEY. See **FORGERY**, 3.

UTTERING. See **FORGERY**, 4, 5.

VENUE.—*Action against a magistrate*.—An action against a magistrate for an act done by virtue of his office is a local action; and therefore, if (since the division of the county of Lancaster, by virtue of the 3 & 4 Will. 4, c. 71, s. 4) the venue in such action be laid in the southern division of that county, but it appears that the cause of action arose in the northern division, the defendant will be entitled to a verdict thereof under the 21 Jac. 1, c. 12, s. 5. *Atkinson v. Hornby*, 2 C. & K. 335.

And see **BANKRUPT. JURISDICTION. REMOVAL**, 13.

WITNESS.—*Co-indictes, who has pleaded guilty*.—A., B. and C., were jointly indicted. A. and B. for stealing, and C. for receiving it, scienter, &c. A. and C. pleaded not guilty, and B. pleaded guilty, and the trial proceeded against A. and C., no judgment having been pronounced against B.: Held, that B. was a competent witness for the prosecution on the trial of A. and C. *Reg. v. Hinks*, 2 C. & K. 462.

WORSTED ACT.—1. *Conviction under Worsteds Act*, 17 Geo. 3, c. 56.—Under sects. 10 and 14 of stat. 17 Geo. 3, c. 56 (for preventing frauds &c. by persons employed in the woollen and other manufactures) a party may be convicted of having in his possession materials used in such manufactures, and suspected to be purloined or embezzled, and of not accounting for the possession, although such goods have not been found concealed in his dwellinghouse, outhouse, &c., or in the execution of a search warrant granted under sect. 10; the offence consisting in the possession itself, not accounted for as the statute requires. *Reg. v. Wilcock*, 7 Q. B. 317.

2. *Distribution of penalties*—Statute reciting title of former act

with a variance.—Stat. 58 Geo. 3, c. 57, describes by their titles and dates several acts relating to persons employed in the woollen and other manufactures, which acts it in part repeals. Among these is an act stated to have been passed in 13 Geo. 3, but agreeing in title with statute 17 Geo. 3, c. 56, and with no act passed in 13 Geo. 3: Held, that this act might be identified by the title with the act recited, and that the legislature must be deemed to have mistaken the date, and, therefore, that the distribution of penalties under statute 17 Geo. 3, c. 56, s. 14, is now regulated by statute 58 Geo. 3, c. 51, s. 3. *S. C. ib.*

3. *Effect of statute 3 Geo. 4, c. 23, s. 2, where prior act gives a form of conviction.*—Statute 17 Geo. 3, c. 56, s. 10, empowers two justices on complaint to cause the party charged to be brought before “two justices,” who are not required to be the same two; and enacts that if such party shall not give a satisfactory account to such justices, he shall be convicted, &c.: Held, that the conviction in such case must state, as required by the subsequent act, 3 Geo. 4, c. 23, s. 2, that the complaint was made to different justices from those who determined it, although statute 17 Geo. 3, c. 56, gives a general form of conviction, not requiring any particular statement as to the justices who first heard or who determined the complaint; and a conviction under this act was quashed for omitting such statement. *S. C. ib.*

PRIVY COUNCIL.

Containing Cases in 4 Moore, Part 3.

APPEAL.—1. *Allowance — Special grounds — Jamaica.*—Appeal allowed under the 7 & 8 Vict. c. 69, direct from the Court of Assize of the island of Jamaica to her Majesty in Council, without bringing a writ of error in the Court of Errors, the intermediate court in the island. Such appeal is not of course, but requires special grounds to be shown to warrant the application. *In re Barnett*, 4 M. 453.

2. *Allowance — Special Petition — Divorce — Mauritius.*—The Charter of Justice of the Mauritius gives no right of appeal to the Queen in Council from a sentence of divorce. But the crown can, upon special petition for that purpose, grant such leave. Appeal by the Cour d'Appel in the Mauritius from a sentence à vinculo matrimonii, upon petition of respondent, discharged as incompetent. But on special petition leave to appeal granted by the Judicial Committee upon terms of the appellants lodging his printed case within a given time, or the appeal to stand dismissed. *D'Orliac v. D'Orliac*, 4 M. 374.

3. *Ground of appeal—Rejection of witness—Grievance—Contempt.*—The rejection of a witness in the course of the hearing of a cause in the Ecclesiastical Court, on the ground of interest, is not of itself an appealable grievance, the hearing being one continuous act, and an appeal being competent, after sentence, from any compartment of the cause. A party in a cause in the Ecclesiastical Court, in consequence of the rejection by the court of a material witness, withdrew himself from the further contest of the cause; the judge decreed the cause on pain of his contumacy. Held, by the Judicial Committee, that such withdrawal was not contumacious, so as to preclude him from his right of appeal from his sentence. *Handley v. Edwards*, 4 M. 407.

ATTACHMENT. See SLAVE TRADE ACT.

CANADA. See TRANSFER.

CAPTORS. See SLAVE TRADE ACT.

CHURCHWARDENS.—*Borrowing money on credit of church rates — For what purposes.*—By the statute 59 Geo. 3, c. 134, s. 14, it is enacted that it shall be lawful for the churchwardens of any parish, with the consent of the vestry, to raise and borrow money upon

credit of the church rates of any parish, for the purpose of defraying the expenses of any church or chapel: Held, by the Judicial Committee of the Privy Council, reversing the judgment of the Archdeacon Court of Canterbury, not to authorize churchwardens to borrow money, upon the credit of the church rates, for repayment of a debt incurred in past years for repairs to the church. *Piggot v. Bearblock*, 4 M. 399.

COLLUSION. See ECCLESIASTICAL COURTS.

COMMISSION TO EXAMINE WITNESSES. See TRANSFER.

CONSISTORY COURT. See ECCLESIASTICAL COURTS.

CONTEMPT. See APPEAL, 3.

COSTS. See SLAVE TRADE ACT.

CROWN. See SLAVE TRADE ACT.

DIVORCE. See APPEAL, 2. ECCLESIASTICAL COURTS.

ECCLESIASTICAL COURTS.—*Consistory—Prerogative—Divorce—Sentence—Fraud—Collusion.*—The validity of a sentence passed in 1816 by the Consistory Court of London, decreeing a divorce à vinculo in a suit of nullity of marriage, may be impeached in a suit brought in 1842 in the Prerogative Court for granting letters of administration by the issue of the marriage pronounced null and void by the sentence of 1816. But in order to set aside such sentence, collusion between the parties, and fraud practised thereby upon the court, must be satisfactorily shown. An allegation impeaching a sentence and pleading facts which, if proved, might amount to fraud, but no collusion, rejected.—*Meddow v. Huguenin*, 4 M. 386.

ERASURES. See WILL, 1.

EVIDENCE. See APPEAL, 3. WILL, 1.

EXECUTION. See WILL, 3.

FOREIGN WILL. See WILL.

FRAUD. See ECCLESIASTICAL COURTS.

FRENCH LAW. See TRANSFER.

INFANT. See MADRAS.

JAMAICA. See APPEAL, 1.

JURISDICTION. See MADRAS.

LOWER CANADA. See TRANSFER.

MADRAS.—*Supreme court—Jurisdiction—General orders—Infants—Registrar—Commission—Public policy.*—By a general order made on the equity side of the Supreme Court of Madras, it was ordered that whenever it shall appear that the property of any infant is unprotected, and not secured for his or her benefit, the registrar shall, with the previous consent of the court or a judge, institute

proceedings on behalf of such infant for the purpose of protecting his or her person or property. In pursuance of this order, the registrar of the Supreme Court, upon petition, obtained an order giving him liberty to file a bill on the equity side of the Supreme Court, as the next friend and on behalf of infants, for an account of their father, who died intestate, against their mother, the administratrix; and notwithstanding an appeal against such order, such bill was filed, to which the defendant put in a plea, which being over-ruled, a further appeal from such decision was interposed to her Majesty in Council. By the practice of the Supreme Court the registrar is entitled to a commission of five per cent. on all sums of money paid into court. Held by the Judicial Committee, that the order of the equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not the statute 2 & 3 Vict. c. 34, was void, it being against public policy to allow an officer of the court to institute suits in the conduct of which he might have a direct personal interest, and the orders made in pursuance thereof reversed. *Kerahoose v. Serle*, 4 M. 459.

MAURITIUS. See **APPEAL**, 2.

ORDONNANCES. See **TRANSFER**.

PATENT.—*Extension of term*—*Foreigner*—*Advertisements in England*.—Term of letters patent for refining sugar by filtration through beds of granulated animal charcoal extended for six years, on the ground of the advantage the public had reaped from the discovery, notwithstanding that the novelty of the invention was small. Where the party applying for an extension is resident abroad, and has no manufacture in England, advertising in the newspapers published in the town or county where the persons to whom he has granted licenses are resident is a sufficient compliance with the 4th section of the act 5 & 6 Will. 4, c. 83. *In re Deroand's Patent*, 4 M. 416.

PREROGATIVE. See **ECCLESIASTICAL COURT**.

REGISTRAR. See **MADRAS**.

SLAVE TRADE ACT.—*Attachment for non-payment of costs*—*Discharge*—*Crown*—*Captor's costs*.—A party attached for non-payment of costs decreed against him on appeal under the Slave Trade Act, in which the crown and the captors were the respondents, upon supersedeas by the crown, ordered to be discharged out of custody, notwithstanding the captor's objection to the crown receiving costs out of the proceeds of the sale of the vessel condemned. By the 44th section of the 5 Geo. 4, c. 113, the captors of a vessel employed contrary to the provisions of the act are only entitled to a moiety of the proceeds of the sale thereof after deducting the costs of prosecution. *Jinnings v. Hill*, 4 M. 369.

SUPREME COURT. See **MADRAS**.

TRANSFER.—*French law of Lower Canada—Debtor and creditor—Deconfiture—Commission to examine witnesses.*—The firm of S. & W. H., in Lower Canada, being indebted to J. W., transferred seventy-five promissory notes to a factor on his account. At the time of the transfer S. & W. H. were en deconfiture. A *saisée arrêt* having subsequently issued by order of the creditors of S. & W. H., the seventy-five notes in the hands of the factor were attached. Held, by the Judicial Committee, that the transfer, having taken place before the execution of the *saisée arrêt*, was valid by the French law in force in Lower Canada. A commission for examination of witnesses in Canada to prove such deconfiture in the circumstances refused. *Semble*, by the old French law prevailing in Lower Canada, all ordonnances not registered are void. *Hutchinson v. Gillespie*, 4 M. 378.

WILL.—1. *Alterations and erasures, when presumed to be made.*—A will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witness could not depose to: Held, by the judicial committee, in the absence of all direct evidence as to the alterations and erasures, that the presumption of law was that such alterations and erasures were made after the execution of the will, and probate of the will granted in its original form. *Cooper v. Bockett*, 4 M. 419.

2. *Codicils—Reference—Incorporation.*—Testator by his will, made in 1823, directed his executors to pay any legacies he might afterwards give by any testamentary writing, witnessed or not; and after making various codicils, he, in 1838, made a codicil which was signed but not attested; and by a further codicil, in 1839, duly signed and attested, he declared that he thereby ratified and confirmed his said will and codicils: Held, that such general reference was not sufficient to identify and so incorporate the codicil of 1838 in that of 1839, and probate of such codicil refused. *Croker v. Hertford (Marquis)*, 4 M. 339.

3. *Execution—Evidence.*—The factum of a will held, under the circumstances of the case, to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that the testator wrote, only the large initial of his Christian name; and the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his will in their joint presence. Evidence of illiterate witnesses as to the acts not affecting their interests, when opposed to the probable acts of an educated man, no fraud being in question, is to be received with great caution. *Cooper v. Bockett*, 4 M. 419.

4. *Foreign will—Englishman domiciled abroad—Wills Act.*—A domiciled Englishman, while resident at Milan, executed, in October, 1838, a codicil, disposing of personal property situate in the United States of America; this codicil was holograph signed, though not attested, but was well executed according to the Austrian law: Held,

by the Judicial Committee, affirming the judgment of the Prerogative Court, 1st, that the validity of the codicil was to be governed by the law of the domicile; and, 2ndly, that the provisions of the 1st Vict. c. 28, applied to testamentary papers made in foreign countries by a domiciled Englishman. *Croker v. Hertford (Marquis)*, 4 M. 330.

5. *Wills Act—Operation of.*—The statute 1 Vict. c. 26, extends generally to wills made previously to the passing of the act, where alterations have been made affecting such wills subsequent to the 1st of January, 1838. *S. C. ib.*

EQUITY.

CONTAINING CASES IN

1 Phillips, part 5.	5 Hare, part 3.
14 Simons, part 4.	9 Ir. Eq. R. parts 1 and 2.
2 Jones & La Touche, part 2.	

ACQUIESCENCE. See EXECUTOR, 1, 2.

ADMINISTRATION.—*Assets—Devisee and legatee.*—Specific legacies and devised real estates must contribute rateably to the payment of specialty debts. *Cornwall v. Cornwall*, 12 S. 298, overruled. *Gervis v. Gervis*, 14 S. 654.

ADMISSION. See ANSWER, 1, 2.

AGENT. See AWARD, 2.

AMENDMENT. See ANSWER, 4. PRACTICE, 1.

ANNUITY. See USURY. WILL, 1.

ANSWER.—1. *Admission and discharge.*—On an inquiry before the master, the plaintiff read from the answer and examination of defendant, the executor, an admission that a promissory note for 400*l.*, belonging to the testator, had come to the hands of the executor shortly after the testator's death; and the executor was then allowed to read the further statement, that some years afterwards, when the plaintiff (the sole residuary legatee) came of age, he had delivered the note to the plaintiff, who thanked him for taking care of it. *East v. East*, 5 H. 343.

2. *Admission and discharge—Evidence—Declaration of trust—Trustee and cestui que trust.*—A. transferred a sum of stock into the joint names of herself and B. and then informed B. of the transfer, expressing her confidence that B. would fulfil the wishes which A. might express to her respecting the same. After the death of A. her administratrix filed the bill against B. for the transfer of the stock, as part of the personal estate of A.; B., by her answer, admitted the transfer of the stock into the joint names of A. and B., and stated that A. afterwards from time to time told her, B., what part of the stock and dividends should be transferred and paid to different persons, and, subject to such dispositions, desired her to hold the remainder for her own use; and B. also by her answer stated that she had, in pursuance of such direction, paid the several sums to the persons mentioned: Held, that the plaintiff having read from the answer the admission of the transfer upon trust, was bound also

to read from the answer the directions or declarations of A. as to the trusts upon which the fund was to be held and disposed of. That the plaintiff ought not, in the circumstances of the case, to be allowed to withdraw that part of the answer which had been read. That as to B.'s statement of the declaration of A. that the residue should belong to B. herself, the court would direct an issue giving the plaintiff an opportunity of examining B. thereon as to the directions given to her by A. That the plaintiff was not bound to read the statement in the answer as to the fact of the payments to the other persons having been made; and that B. was bound to prove by other evidence the payments which she had made in pursuance of the trusts. *Freeman v. Tatham*, 5 H. 329.

3. *General orders*—"Last answer."—"The last of several answers" in the 66th Order of May, 1845, and "the last answer" in the 68th Order, mean the last answer that is required to be put in before a replication can be filed. Distinction between evasion of the General Orders and irregularity. *Arnold v. Arnold*, 1 P. 805.

4. *Practice*—*Defendant*—*Amendmet*—*Answer*.—A defendant may put in his answer notwithstanding an order to amend has been served upon him. *Macherel v. Fisher*, 14 S. 604.

APPEAL. See PRACTICE, 7.

APPOINTMENT.—*Power*.—If a fund is given in trust for all and every of the children of A. in such parts or shares and in such manner and subject to such directions, contingencies and restrictions as A. shall appoint; an appointment of the whole income of the fund to the children for their lives successively is invalid. *Lloyd v. Laver*, 14 S. 645.

APPORTIONMENT. See TENANT FOR LIFE, 1, 2.

ARBITRATION AND AWARD.—1. *Award by commissioners under act of parliament*—*Power of arbitrators to impose terms*—*Setting aside award*—*Equity to enforce a parol contract*—Commissioners appointed under an act of parliament to set out the metes and bounds of mines and quarries in the forest of Dean, and to fix the rent to be paid for the same, held, under the terms of the act, to have no power to compel a miner to pay in money for by-gone workings, or to exclude him from the award if he refused to make such payment. Commissioners appointed by an act of parliament to determine the respective rights of the crown and the customary miners on crown lands had made an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, and which the miner did not afterwards fulfil: Held, that after the time limited by the act for making the award had expired, the court would not set aside the award at the suit of the crown, as it could not then restore the miner to his rights under the act. In the case of an award made upon the faith of a parol contract entered into by a party taking a benefit under the award, that such party would pay a sum of money to the crown, an information by the crown seeking specific performance of the parol contract, and there-

by in effect to add the parol agreement to the award, cannot be sustained. *Attorney-General v. Jackson*, 5 H. 355.

2. *Award by commissioners—Excess of authority—Miner's agent.*—The agent employed by a miner in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds, and fixing the rents and duties in respect thereof, is not therefore the agent of the miner for the purpose of making a contract with the commissioners not within the powers which had been conferred upon them in that character. *S. C. ib.*

3. *Same.—Semble*, the refusal to pay a sum of money according to an agreement, upon the faith of which an award was made, although it was a stipulation which the commissioners making the award were not empowered to insist upon, would be a ground upon which in equity the party to whom the monies were to have been paid might resist the performance of the award, if the other party had sought the aid of the court to enforce it. *S. C. ib.*

4. *Rule of court—Demurrer—Jurisdiction.*—A general demurrer to a bill to set aside an award, which was agreed to be, but had not been made a rule of the court of Chancery, overruled by the Vice-Chancellor, but allowed, on appeal, by the Lord Chancellor, (see 2 Phil. 79.) *Heming v. Swinnerton*, 14 S. 588.

5. *Submission to arbitration—Rule of court—Motion.*—The submission to arbitration may under the statute 9 & 10 Will. 3, c. 15, be made a rule of court, not only after the award has been made but after the last day of the term following the publication of the award, and when therefore it is no longer open to either party to complain of the award on the ground of corruption or undue practice. An objection to the validity of an award, apparent upon the award, is not an objection to making the submission a rule of court under the statute. A motion to make a submission to arbitration a rule of court under the statute may be made *ex parte*. *Semble. S. C. 5 H. 350.*

BAD TITLE. See **VENDOR AND PURCHASER**, 1.

BANKRUPTCY.—*Proof of debt.*—Four partners and two sureties for them entered into a joint and several bond to trustees of a banking company to secure the payment of all such sums of money as upon the balance of any account current between the partners and the bank should from time to time be due by the partners to the extent of 1000*l.* Separate judgments were entered against the obligors, the trading firm having become bankrupt: Held, that the banking company might prove against the joint estate for a balance less than 1000*l.* due on foot of an account current. *In re Clarkes*, 2 J. & L. 212.

And see **INJUNCTION**.

BANK STOCK. See **DEED**, 1.

BIDDING. See **RECEIVER**, 2. **SALE UNDER COURT, CHARGE.** See **DEBTOR AND CREDITOR**, 1.

CHARGING ORDER. See PRACTICE, 2.

CHARITY.—1. *Charitable use—Bequest for—Congregations of Unitarians.*—A bequest for the assistance of Unitarian congregations held to be valid, and the trust directed to be carried into execution. —*Shrensbury v. Hornby*, 5 H. 406.

2. *Charitable use—Legacy for the public benefit.*—A bequest to the queen's chancellor of the exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, held to be valid so far as related to the pure personalty, but void in respect of the personalty savouring of realty. —*Nightingale v. Goulburn*, 5 H. 484.

3. *Grammar school—Scheme—Appointment of trustees—Scholars—Boarders—Practice—Attorney-general.*—By the statutes of a free grammar school, founded at Manchester in the reign of Henry 8, it was provided that a high master and usher should be appointed, with certain stipends payable out of the revenue of the charity, who were to teach freely and indifferently any male child who should come to the school, from whatever county or shire, without any money or reward whatever, except only the said stipends; one of which scholars was to be appointed by the head master to teach the infant scholars (infantes) their A, B, C, primer and sorts, till they began grammar. The surplus income of the charity, when it exceeded a certain sum, which was to be kept as a reserve, was to be applied in exhibitions for the scholars at the universities of Oxford and Cambridge. Vacancies in the body of trustees, who were twelve in number, were to be filled up from among honest men of the parish of Manchester; and there was a power to the trustees for the time being to augment, expound, and reform all such of the original statutes as concerned schoolmaster, usher, and scholars. The revenue of the charity having of late years greatly increased, and an information having been filed for a new scheme, it appeared that for upwards of a century past some of the trustees had been elected from adjacent parishes and counties; and that for a like period the two masters had been allowed to take boarders, who had participated indiscriminately with the other scholars in the exhibitions and other benefits of the charity. The trustees had also sanctioned a regulation, by which boys under six years of age and unable to read were excluded from the school. By the decree of Lord Chancellor Cottenham it was referred to the master to settle a scheme with the following declarations:—first, that in future appointments of trustees regard was to be had to the qualifications required by the statutes; secondly, that all boys, who were of an age to be capable of receiving instruction, were to be admitted; thirdly, that boarders were not in future to be eligible to exhibitions, or to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds might be increased. On a rehearing before Lord Chancellor Lyndhurst, it was held that there was no ground for excluding boarders from the benefit of the charity. The third declaration was accordingly struck out, and in lieu of it a reference directed to the master to inquire on

what conditions, and subject to what restrictions, the masters were to be allowed to receive boarders in their houses. The attorney-general ought to be a party to all inquiries before the master, under 5 Geo. 3, c. 101 (Sir S. Romilly's Act), and any proceedings taken in his absence are irregular.—*The Attorney-General v. The Earl of Stamford*, 1 P. 737.

4. *Grammar school—Scheme—Erection of additional buildings—Practice.*—A scheme relating to a charity which had not been submitted to the master, but had been sanctioned by the attorney-general, directed to be carried into effect. Monies belonging to a free school founded by Queen Elizabeth ordered to be invested in land, for the purpose of erecting additional buildings in furtherance of the objects of charity. *The Attorney-General v. The Earl of Mansfield*, 14 S. 601.

5. *Jurisdiction—Petition—Practice.*—After a decree had been made in a suit by information and bill for the general administration of a charity, one of the objects of which was a free grammar school, the master of the school, who was not a party to the suit, presented a petition in it, with the sanction of the attorney-general, stating that in 1832, which was five years before the decree was made, the defendants, the trustees of the charity, unlawfully removed him from his office, and praying to be paid the arrears of his salary: Held, that the petition could not be entertained, because it was presented by a person who was not a party to the suit, and involved an important question between the petitioner and the trustees, which was not raised at the hearing of the suit; held also, that the court would not have had jurisdiction to determine the question, if the petition had been presented under Sir Samuel Romilly's Act; but that a new suit must be instituted. *The Attorney-General v. The Corporation of Bristol*, 14 S. 648.

6. *Poor of a parish—Parochial relief—Poor rate—Education and clothing of poor children—Scheme—Decree—Rehearing.*—*Semble*, a decree containing a declaration as to the proper mode of applying the income of a charity estate with reference to the founder's deed need not be reheard, in order to enable the court, on the hearing of a subsequent information, to make a different prospective declaration in reference to the same question. Observations on the doctrine of limiting the participants in a fund devoted to the poor of a parish to those who are not in receipt of parochial relief. *Semble*, a sounder rule is to administer the charity according to the ordinary rule, and leave to chance to what extent it may operate to the relief of the poor rate. The order of reference to approve of a scheme in such a case contained a special authority to the master to include provisions for educating, clothing, and apprenticing the children of the poor, advancing sums by way of loan, &c. Sketch of scheme pursuant to such order. *Attorney-General v. Bovill*, 1 P. 762.

CHILDREN. See DEED, 2.

CHOSE IN ACTION. See HUSBAND AND WIFE, 2, 3.

COMMISSIONERS. See ARBITRATION, 1, 2, 3. **INCLOSURE ACT.**

COMPENSATION. See SPECIFIC PERFORMANCE.

CONSTRUCTION. See DEED. WILL.

CONTRIBUTION. See REALTY.

CONVERSION. See WILL, 2.

COPY BILL. See PRACTICE, 6.

CORPORATION. See RAILWAY COMPANY, 1.

COSTS.—1. *Motion—Practice.*—The costs of an abandoned motion, in support of which the party has given notice of his intention to read an affidavit previously filed in the cause, are only 40s. *Green v. Meares*, 14 S. 526.

2. *Same.*—If the costs of a motion are reserved until the hearing, and at the hearing no mention is made of these costs, but the costs of the suit are reserved until the hearing for further directions, that reservation does not include the costs of the motion, and consequently the court can make no order respecting them. *Gardner v. Marshall*, 14 S. 575.

3. *Notices.*—A party unnecessarily serving notices in a cause shall pay the costs occasioned thereby. *Hogan v. M'Namara*, 2 J. & L. 242.

4. *Revivor.*—A decree for the delivery of the possession of lands and title deeds and payment of money was made, with costs to be paid by the defendants. One of them having performed all that he was directed by the decree to do, except paying the costs, died before the costs were taxed: Held, that there could be no revivor for the costs. The general rule is, that there can be no revivor for untaxed costs; and whether the abatement is caused by the death of the party to pay, or the party to receive the costs, is immaterial. *Morgan v. Scudamore*, 2 Ves. jun. 313; 3 Ves. 195; and *Barry v. Stawell*, Han. & Kel. 1, observed upon. *Bowyer v. Beamish*, 2 J. & L. 228.

And see INTERPLEADER. TRUSTEES, 3, 4.

COVENANT. See PARTNERS.

DEBT. See SATISFACTION. WILL, 10.

DEBTOR AND CREDITOR.—1. *Charge upon land—Judgment—Equitable mortgagee.*—Notwithstanding the stat. 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. *Whitworth v. Gaugain*, 1 P. 728.

2. *Creditor's deed—Consideration.*—A debtor conveyed all his property to trustees for his creditors, in consideration of a licence and release granted to him by the deed, and afterwards died. Seven years after his death a creditor, who had notice of the deed shortly

after its execution, but did not execute it, filed a bill to be allowed to execute it and to have the benefit of it. But the court dismissed the bill, because the debtor could not have the benefit of the consideration. *Lane v. Husband*, 14 S. 656.

3. *Judgment—Notice—Subsequent purchaser.*—Notice of a judgment not revived or redocketed under the 9 Geo. 4, c. 35, will not make it binding against a subsequent purchaser for valuable consideration. *Beere v. Head*, 9 Ir. E. R. 76.

DECREE.—*Pleading—Error in decree—Purchaser pendente lite.*—A., having a rent-charge secured by a term and judgment, in July, 1841, filed a bill praying an account of prior and contemporaneous incumbrances and a sale. There was a decree to account, directing an account of all incumbrances, and a final decree directing a sale of the inheritance. Subsequently to the grant of the rent-charge the grantor executed two leases, and after them two mortgages. A. filed a supplemental bill impeaching the leases, and charging, that if the estate was sold subject to the leases, it would be insufficient to pay the incumbrances: Held, first, that the final decree being erroneous in directing a sale of the inheritance, the court would not in this suit correct the error; secondly, that A. was not entitled to set aside the leases, unless they were prejudicial to his own security, and it was referred to the master to inquire whether they were so. *Hamer v. Nesbit*, 9 Ir. Eq. R. 96.

And see **VENDOR AND PURCHASER.**

DEED.—1. *Construction of—Bank stock.*—A sum of 7500*l.* bank stock was vested in trustees upon trust out of the proceeds thereof to pay an annuity of 561*l.* to I. for life, and to invest the residue in bank stock or government security; and upon trust that after the decease of I. the 7500*l.* bank stock, and the savings of the dividends or proceeds thereof, be divided into five equal shares, a share to be transferred to each of five persons therein named. One-fifth of the 7500*l.* bank stock was, upon the marriage of one of the persons entitled to the corpus of the trust fund in the lifetime of the annuitant, made the subject of settlement: Held, upon the intention of the parties, to be gathered from the nature of the instrument and upon its construction, that one-fifth of accretions, by way of bonus, subsequently added to the original capital sum, and also one-fifth of the surplus dividends were subject to the trusts of the settlement. Another of the persons entitled to one-fifth of the corpus of the trust fund, by indenture reciting that he was entitled, after the decease of the annuitant, to one-fifth of the sum of 7500*l.* bank stock, in consideration of the sum of 500*l.*, sold and assigned 750*l.*, or one-half of the sum of 1500*l.* bank stock, and all his estate and reversionary interest therein: Held, that the purchaser was not entitled to the accretions by way of bonus, which had been afterwards declared on the 750*l.* bank stock, or to the surplus dividends thereof. *Plunket v. Mansfield*, 2 J. & L. 344.

2. *Construction—Children.*—A settlement directed the trustees, immediately after the decease of the survivor of the husband and

wife, to transfer a fund unto and amongst all and every the son and sons, daughter and daughters, of the husband and wife, and the children of such son and sons, daughter and daughters, in case any of them should be dead leaving issue, share and share alike; but the child or children of such of the said sons and daughters as should be then dead were to be entitled only to a parent's share; and in case there should be no child or children of the husband and wife living at the death of the survivor of them, then in trust to transfer the fund to the survivor, his or her executors, &c. There were three children of the marriage, but they all died before either of their parents; two of them left children, some of whom survived both their grandfather and grandmother: Held, that the surviving grandchildren were entitled to the fund. *Green v. Bailey*, 14 S. 635.

DEFENDANT. See EVIDENCE, 1.

DEV. VEL NON. See WILL, 3.

DEVISE. See REALTY. WILL.

DOWER.—*Marriage articles.*—By marriage articles the intended husband covenanted that in case he should die in the lifetime of his intended wife without issue by her, she should be entitled to one-half of what property real or personal he should die seised or possessed of; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime contrary to the true intent and meaning of the articles. There was no issue of the marriage, and the husband died, leaving his wife surviving. She is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance. *Hamilton v. Jackson*, 2 J. & L. 295.

ELEGIT. See DEBTOR AND CREDITOR, 1.

ERROR. See DECREE. PARTIES.

EVIDENCE.—1. *Defendant — Witness.*—Although relief is prayed against a defendant, he may be examined as a witness by a co-defendant, against whom independent relief is prayed. *Ashton v. Parker*, 14 S. 632.

2. *Next friend — Practice — Witness.*—An order for the examination of a next friend as a witness, if obtained ex parte, is irregular; and especially if it be made pending a reference to the master as to the priority of the suit. *Palmer v. Horton*, 14 S. 633.

And see ANSWER.

EXCEPTIONS.—*Master's report — Admission of evidence.*—The master in his report stated that he admitted certain evidence, and that thereupon he found certain facts. A party to the admission of the evidence, and to the conclusion thereupon, cannot open that objection as appearing on the face of the report, without having taken exceptions. *East v. East*, 5 H. 347.

EXECUTOR.—1. *Breach of trust — Acquiescence.*—An executor

having possessed a promissory note for 400*l.*, part of the assets of the testator, retained the note in his possession without taking any proceedings to recover the amount or the interest for seven years; and at the end of seven years, when the sole residuary legatee came of age, the executor delivered the note to the residuary legatee. The residuary legatee, ten years afterwards, filed his bill against the executor, charging him with breaches of trust in the administration of the estate. The court under such circumstances refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce the payment of the amount due on the note. *East v. East*, 5 H. 348.

2. *Same*.—In such a case the executor would not be chargeable, unless it should be found that the amount of the note could have been recovered during the seven years between the death of the testator and the time when plaintiff attained his majority; and if it were found that the amount could have been recovered during that time, still the executor would not be chargeable, unless it should be found that it could not have been recovered during the ten years which elapsed after the note had been delivered to the plaintiff. *S. C. ib.*

3. *Executor de son tort—Principal and agent—Pleading*.—The widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration: Held, that A. having received monies which he knew to be part of the testator's, and not having accounted for such monies to the legal personal representative of the testator, A. was liable to be sued as executor de son tort. That the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow and A. in reference to the testator's estate were the acts of wrong-doers, and the law does not recognize the relation of principal and agent as existing among wrong-doers. That A. was liable as executor de son tort to account to a party interested in the testator's estate, in a suit for that purpose, without any charge of collusion between such executor de son tort and the legal personal representative. *Sharland v. Millon*, 5 H. 469.

And see *VENDOR AND PURCHASER*, 5.

FALSE RECITAL. See *MORTGAGOR*, 1.

FINES. See *TENANT FOR LIFE*, 1, 2.

FOREST OF DEAN. See *AWARD*, 1.

FRAUD.—Pleading—Demurrer—Acquiescence—Solicitor.—The plaintiff was entitled under her father's will and an appointment by her mother, who was his executrix, and being in embarrassed circumstances, and without professional advice, and ignorant of the amount of her claims, G., her solicitor, induced her in 1833 to convey to him all her rights, which he represented to be only one

half that they amounted to, for a rent-charge on the lands so conveyed to him, the payment to be personally secured by him. The deed was drawn by G., and contained no clause of re-entry or covenant by him to pay, but a non-alienation clause was fraudulently, as alleged, inserted. G. ceased to pay in 1836, and the bill was filed in 1845 to set aside the deed and carry the trusts of the will into execution, and for an account of the testator's property, so far as to ascertain the plaintiff's rights, and, if necessary, of the personal estate of her mother. B., the executor of the mother and the administrator de bonis non of the father, was made a party, but the trustee of the father's will was not: Held, on a demurrer filed by G., first, that the length of time since the execution of the deed falling short of twenty years could not be set up by him on demurrer; second, that if it could, the case was one of actual fraud, and the time would not bar; third, that there was no misjoinder or multifariousness; fourth, if multifarious as to B., G. could not raise the objection; fifth, that the surviving trustee was not a necessary party. *O'Kelly v. Glenny*, 9 Ir. E. R. 25.

FRAUDS, STATUTE OF. See **PARTNERSHIP**.

GENERAL ORDERS. See **ANSWER, 3. PRACTICE.**

GRAMMAR SCHOOL. See **CHARITY, 3, 4.**

GUARDIAN.—*Testamentary guardian—Solicitor.*—Two out of three testamentary guardians declined to accept the trust. They are not entitled as of right, after the death of their co-guardian, to be appointed guardians by the court. But testamentary guardians (other circumstances being equal) will be preferred to the person nominated in the will of the mother (the third guardian), to be the guardians of the infants after her decease. The solicitor for any of the persons who exercise a controul over the minor's estate will not be appointed the guardian of their persons. *In re Johnston*, 2 J. & L. 222.

And see **WILL**.

HERITABLE BOND. See **INJUNCTION**.

HUSBAND AND WIFE.—1. *Agreement for separate maintenance—Legality of provision for the event of future separation—Infancy.*—Whether an ante-nuptial contract, whereby the intended husband agreed to secure to the intended wife an annuity for her separate maintenance in the event of his death, or any separation taking place between them during their lives, is void; and if not, whether such contract is valid as far as it is intended to secure an annuity to the wife in case of a separation or divorce for any cause, or whether it is valid to the extent of securing the annuity to the wife in case of desertion by the husband, or divorce without misconduct on the part of the wife, or whether it is valid only to the extent of securing the annuity to the wife in the event of her surviving the husband: *Quære. Cochsedge v. Cochsedge*, 5 H. 397.

2. *Chose in action—Reversionary interest.*—The tenant for life of a trust fund having consented to surrender her interest to the

reversioner, a married woman, and the latter having been examined in court and consenting, the court ordered the fund to be transferred to her husband. *Creed v. Perry*, 14 S. 502.

3. *Same*.—A married woman who was entitled to a trust fund in reversion having had the life interest assigned to her, the court ordered the fund to be transferred to her husband, she consenting. *Hall v. Hugonin*, 14 S. 595.

4. *Settlement*.—A husband had large advances made to him by his wife's father, and had the benefit of a provision made for his wife by her father's will, and afterwards became bankrupt: Held, that his wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life for her separate use, without power of anticipation. *Gardner v. Marshall*, 14 S. 575.

And see TRUST.

INCLOSURE ACT.—*Power of commissioners*—*Public or private act*—*Injunction*—*Damage to watercourses or drain*.—An act of parliament empowering commissioners to inclose the common lands in a certain township, reciting the titles of certain landowners, and that it would be greatly for the advantage of the proprietors of the common lands that the same should be divided and inclosed, enacted, that it should be lawful for the commissioners to set out and make such ditches, watercourses and bridges, of such extent and form and in such situations, as they should deem necessary in the lands to be inclosed; and also to enlarge, cleanse or alter the course of and improve any of the existing ditches, watercourses or bridges, as well in and on the same lands, as also in any ancient inclosures or other lands in the township as they should deem necessary: Held, that the act did not empower the commissioners to alter the drains in the common lands from another township, and thereby to obstruct the drainage of the lands in such other township, to the damage and injury of the owners of such lands. Where an act of parliament empowers certain persons to deal with their own property, or with property in a certain place or district, or defined by a certain description, and does not by express words or by necessary implication import that the legislature intended to affect the rights of other persons in other property, courts of law do not construe mere general words in the act as affecting the rights of strangers, as to the property not within the description of that with which the act expressly purports to deal. Whether an act of parliament is to be deemed a public act, binding on all the queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act. *Darson v. Paver*, 5 H. 415.

INDEMNITY. See VENDOR AND PURCHASER, 5.

INFANCY. See HUSBAND AND WIFE, 1.

INJUNCTION.—Heritable bond—Jurisdiction—Scotch Court—Bankrupt.—The Court of Chancery has jurisdiction to grant an injunction, at the suit of the assignees of a bankrupt, to restrain the obligee under a heritable bond, executed by the bankrupt before his bankruptcy, from proceeding in the Court of Session in Scotland, to obtain payment of his debt out of a real estate in Scotland belonging to the bankrupt at the date of the bond, and thereby charged with the debt; but it will not exercise that jurisdiction, if the circumstances of the case render its interference inadvisable, as if the question between the parties might upon the whole be more conveniently litigated and with a more conclusive result there than here. *Jones v. Geddes*, 1 P. 724; 14 S. 606.

And see INCLOSURE ACT.

INTERPLEADER.—What will support bill—Costs.—John lodged 130*l.* in the bank in his own name upon a deposit receipt; afterwards Daniel, by the direction of John, lodged an additional sum of 5*l.* in the bank, and obtained a new deposit receipt for 135*l.* in the name of Catherine, and the old receipt was cancelled; John died, and Daniel, as his administrator, claimed the money, alleging that the gift to Catherine was incomplete, and that he had taken the receipt in the name of Catherine without the direction of John, and he refused to give Catherine the deposit receipt, and required the bank to pay him the money. Catherine also demanded the money of the bank, which they refused to pay, as she had not the deposit receipt. Both Catherine and Daniel commenced actions against the bank, who filed a bill of interpleader against them. This is not the case of a double demand for one duty, but it is a lease in which there may be two liabilities; the bill was therefore dismissed. A mere pretext of a conflicting claim will not support a bill of interpleader; the court is bound to see that there is a question to be tried. When a bill is dismissed, the court cannot decree the costs to be paid by a defendant whose misconduct occasioned the suit. *Cochrane v. O'Brien*, 2 J. & L. 380.

IRREGULARITY. See ANSWER, 3.

JOINT TENANT. See WILL, 6.

JUDGMENT. See DEBTOR AND CREDITOR, 1, 3. LIMITATIONS, STATUTE OF.

LESSOR AND LESSEE.—Specialty debt—Rent.—A lessee surrendered his lease and took a new one, for a different term, at a different rent, and with different covenants: Held, nevertheless, that the rent, accrued under the original lease (the whole of which remained unpaid), was a specialty debt under the covenant for payment of it contained in that lease. *Gresnwood v. Taylor*, 14 S. 505.

LIMITATIONS, STATUTE OF.—1. Avoidance by process.—A suit was instituted in 1797 for the administration of real and personal assets. X., a creditor, filed a bill to establish an unliquidated demand by specialty against the realty in 1804, and obtained a

decree, and a judgment ascertaining his demand, in 1822. There were various proceedings in the suit of 1797, in which demands, similar to X.'s, were recognized as binding the estates; and there was a sale in 1816, and for the protection of the purchaser a portion of the proceeds was invested till X.'s suit should be determined. X. died in 1822, administration to him was obtained in 1841, and in that year the administrator came in under an advertisement for creditors in the first suit to prove X.'s demand against the fund invested: Held, that the principle of *Sterndall v. Hankinson* (1 Sim. 393) applied, and the demand was not barred by the Statute of Limitations. *Bermingham v. Burke*, 9 Ir. E. R. 86.

2. *Judgment*.—On a reference to inquire the sum due for principal, interest and costs, on foot of a judgment, for which a receiver has been appointed, the respondent is entitled to the benefit of the Statute of Limitations, although not set up in showing cause against the appointment of the receiver; and the petitioner is entitled only to interest for six years from the date of the conditional order for the appointment of the receiver. *Dourk v. Burke*, 9 Ir. E. R. 83.

3. *Trust*.—F. was indebted to C. in 800*l.*, to secure which, in 1814, he granted to C. an annuity or rent of 100*l.* to be issuing out of the lands of Dovegrove (held by F. under a lease from C.), habendum until thereby the 800*l.* and interest was paid, and F. covenanted to pay the annuity. In 1815 C. assigned the sum of 798*l.* (being the money then due on foot of the 800*l.*) and the annuity to H., and covenanted that the annuity should be regularly paid; and being entitled to a sum of 2000*l.* charged on lands of which he was himself tenant for life, he, as a further security, assigned 800*l.*, part of the 2000*l.*, to a trustee upon trust, in case the annuity should be unpaid for forty-one days, then from time to time to call in and receive such parts of the 2000*l.* as should be sufficient to satisfy the arrears, and apply same in payment thereof, and after payment thereof in trust for C. In 1816 the annuity was unpaid for more than forty-one days, but payments were made on foot of it up to October, 1821. In 1820 C. evicted the lands of Dovegrove for non-payment of rent, and died in 1824. Under a decree, to take an account of incumbrances affecting the lands charged with the 2000*l.*, made in a suit instituted in 1839, the master reported that the principal money which, in October, 1821, was due on foot of the 798*l.*, and to secure which the 800*l.* had been assigned, was still due, and that the residue of the 2000*l.*, after payment of that sum, was due to the personal representative of C. Upon an exception taken by the personal representative of C.: Held, that the demand of H. was not barred by the 3 & 4 Will. 4, c. 27, s. 40. The trust created by the deed of 1815 is a continuing trust not to be executed once for all, and a present right to receive the 800*l.*, within the meaning of the 3 & 4 Will. 4, c. 27, s. 40, did not accrue upon the non-payment of the annuity for forty-one days. A person entitled to a sum of money charged upon land assigned it to trustees in trust to secure the payment of a debt, and, after payment thereof, in trust for himself. He cannot, as against

his creditor, insist that the trust is barred by the Statute of Limitations. *Heenan v. Berry*, 2 J. & L. 303.

LUNACY.—1. *Person of lunatic.*—Mode of proceeding by the committee to obtain possession of the person of a lunatic, who, before inquisition found, had been committed to custody under the 1 Vict. c. 27. *In re Flanagan*, 2 J. & L. 343.

2. *Petition—Practice—Right to begin.*—A petition to confirm the master's report in lunacy, and a cross petition in the nature of exceptions to it, coming in to be heard together: Held (overruling *In re Bariatinsky*), that the counsel for the cross petition ought to begin. *In re Townshend*, 1 P. 804.

MARRIAGE ARTICLES. See DOWER. HUSBAND AND WIFE.

MASTER. See EXCEPTIONS. LUNACY. SALE UNDER COURT.

MINES. See ARBITRATION, 1, 2.

MISDESCRIPTION. See VENDOR AND PURCHASER, 4.

MISJOINDER. See RENT CHARGE.

MORTGAGOR AND MORTGAGEE.—1. *False recital of prior incumbrance—Equitable mortgage—Priorities.*—P., being indebted to B., makes a mortgage of an equity of redemption of real estate to B. for the purpose of securing the debt, and by the indenture of mortgage it was falsely recited that the mortgaged estate was subject to an equitable charge for monies due to J., secured by the deposit of a deed. P. retained the deed in his own possession, and subsequently deposited it with J., as a security for money partly lent to P. by J. before and partly after the mortgage of the estate to B. J. at the time of the deposit had no notice of the prior mortgage to B.: Held, that inasmuch as an actual prior charge on the estate, if afterwards paid off by P. or otherwise avoided, would have left B. in the position of the first mortgagee of the equity of redemption, the recital of a charge, which had in fact no existence, could not have the effect of postponing B. That the interest acquired by J., by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption subject to the mortgage to B., and that B., in a suit for that purpose, was entitled, as against J., to the ordinary decree for payment, or for foreclosure and delivery up of the deed on default. *Frazer v. Jones*, 5 H. 475.

2. *Specialty debt.*—A lessee mortgaged the demised premises, and covenanted for himself and his heirs with the mortgagee, his executors, administrators and assigns, to repay the mortgage money. Afterwards the mortgagee joined with the mortgagor in surrendering the lease for the purpose of having a new lease granted to the latter, which they agreed should be assigned to the mortgagee by way of security for his principal and interest, and that that arrangement should not prejudice any other security that the mortgagee might have for his debt. A new lease was granted to the mortgagor, but

he did not make any assignment of it in pursuance of the agreement. After his death the mortgagee assigned to A. the principal and interest due to him, and his security for them under the deed of surrender: Held, that the covenant in the mortgage of the original lease was not extinguished by the surrender, and that the assignee was a specialty creditor of the mortgagor in respect of it. *Greenwood v. Taylor*, 14 S. 505.

And see DEBTOR AND CREDITOR, 1.

MOTION. See COSTS, 1, 2.

NEXT FRIEND. See EVIDENCE, 2.

NEXT OF KIN. See WILL, 5.

NOTICE. See DEBTOR AND CREDITOR, 3. VENDOR AND PURCHASER, 3.

PAROCHIAL RELIEF. See CHARITY, 6.

PARTIES.—1. *Presumptive next of kin*.—Where property is settled in trust in remainder for the persons who should be the next of kin of the tenant for life at her death, the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life. *Fowler v. James*, 1 P. 803.

2. *Supplemental suit—Pleading*.—A tenant for life mortgaged under power the inheritance for 500*l.* and 1000*l.*, and afterwards paid the first mortgage, and took an assignment to a trustee. After his death B. became entitled to the mortgages. C., the tenant in tail, being a minor, covenanted by marriage articles in 1827 to convey the lands in trust to sell and pay off the debts then affecting them, and subject thereto for herself for life, remainder to her children, and a recovery was suffered on her majority. B. filed a bill and obtained a report, finding in 1835 that arrears of rent and fines due in the life of A. and after were paid off by loan on mortgage, and found this sum and the two mortgages, with interest on them all before the death of A. to the time of the report, to be due, and a sale was decreed to pay them. In 1840 B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution: Held, first, that the trustee was a necessary party as representing the inheritance. Second, that the first decree was erroneous, declaring the inheritance liable for interest, payable by the life estates of A. and C., and that a purchaser under the second decree, in which the inheritance was not represented, could not be held to his purchase. A report of good title, plaintiff's solicitor undertaking to procure a signature, is informal. *Muguirley v. Brady*, 9 Ir. E. R. 59.

And see FRAUD.

PARTNERSHIP.—1. *Covenants*.—Premises were demised to A. and B., who were co-partners, upon which they carried on their partnership business. A. died during the lease, and after his death his executors carried on the business in co-partnership with B. on the

premises: Held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered as several as well as joint, so as to make A.'s estate liable for breaches of the covenants which occurred after his death. *Clarke v. Bickers*, 14 S. 639.

2. *Statute of frauds—Partners in dealing with land—Agreement made and signed by third persons.*—A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds, and such an agreement being proved A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale v. Hamilton*, 5 H. 369.

3. *Same.*—An agreement between B. and C. was communicated by one of the parties to A. After applications in writing from A. for the signature of the other parties to a memorandum expressing his interest as a partner in the transaction relating to the land, the subject of the agreement, and the court held that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in A., and that A. might avail himself of the acknowledgment, notwithstanding the agreement between B. and C. was *res inter alios acta*, and notwithstanding A. objected to some of the terms in that agreement as not truly expressing his partnership contract. *S. C.*, *ib.*

PETITION. See LUNACY, 2. PRACTICE, 5.

PLEADING.—*Bill of revivor—Provisional assignee.*—Where the provisional assignee of the Insolvent Court is a party defendant to a suit and dies, the new provisional assignee may be made a party by revivor merely. *O'Brien v. Mahon*, 2 J. & L. 201.

And see EXECUTOR, 3. PARTIES. SPECIFIC PERFORMANCE.

POOR. See CHARITY, 6.

PORTIONS. See SATISFACTION.

POWER. See APPOINTMENT. TRUSTEE, 1, 2.

PRACTICE.—1. *Amendment.*—A formal amendment having been made after the bill had been taken pro confesso, without having applied under the 51st General Order, the court permitted the amendment to stand without prejudice to order to take the bill pro confesso. *Martley v. French*, 9 Ir. E. R. 4.

2. *Charging order—3 & 4 Vict. c. 105.*—The 23d and 24th sections of 3 & 4 Vict. c. 105, are to be read in connection, and therefore the charging order under that statute is first a conditional order ex parte to be made absolute, which last is the order contemplated by the 23d section. *In re Dunscombe*, 9 Ir. E. R. 4.

3. *Election of suit.*—The proper course to compel the plaintiff to elect between a suit in equity and one at law is by entering a side bar rule, and not by application to the court. The defendant is at liberty

to enter the rule at any time after the filing of his answer, and by it to call on the plaintiff to elect within eight days after service, notwithstanding that the plaintiff has six weeks to except to the answer. *Hollier v. Hedges*, 9 Ir. E. R. 37.

4. *Petition—Order of hearing.*—Where a petition to confirm a report, and a counter petition for a reference back, come on to be heard, the latter is to be heard first. *Sturges v. Paley*, 14 S. 599.

5. *Petition—Title.*—The court will not make an order on a petition presented under an act of parliament, unless it be entitled in the matter of the proper act. *In re French*, 2 J. & L. 243.

6. *Prayer of process—Copy bill—New orders.*—The prayer that a defendant on being served with a copy of the bill may be bound by the proceedings in the cause, need not be inserted in the prayer of process. *Smith v. Groves*, 14 S. 603.

7. *Staying proceedings in a suit—Appeal.*—Motion to stay proceedings to enforce an answer until an appeal to the House of Lords, from an order overruling a plea, should be disposed of, refused. *Garcias v. Ricardo*, 14 S. 266, 268.

8. *Will—Declaration of rights.*—The court will not, in a suit to carry the trusts of a will into execution, merely declare the rights of the parties, and then leave them to act on that declaration out of court. *Brown v. Martyn*, 2 J. & L. 333.

And see COSTS. EVIDENCE. EXCEPTIONS. RECEIVER. SALE UNDER COURT.

PRECATORY TRUST. See WILL, 6, 7.

PRINCIPAL AND AGENT. See EXECUTOR, 3.

PRIORITY. See MORTGAGOR, 1.

PRO CONFESSO. See PRACTICE, 1.

PROVISIONAL COMMITTEE. See RAILWAY COMPANY, 3.

RAILWAY COMPANY.—1. *Directors—Usurpation of office—Shareholders—Parties—Void or voidable transaction.*—The rule that a suit by individual shareholders in an incorporated company, complaining of an injury to the corporation, cannot be maintained, if it appears that the plaintiffs have the means of procuring a suit to be instituted in the name of the corporation itself, applies equally, whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of a majority of shareholders, or an act or transaction absolutely illegal, and incapable of being confirmed by such majority. The court will not entertain a bill by shareholders in an incorporated company, seeking merely to restrain the directors de facto from acting as such, on the sole ground of the alleged invalidity of their title to their offices. A general demurrer to a bill by two members of an incorporated railway company, in their individual characters, against the corporation and twelve other members who were alleged to have usurped the office of directors, and to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the company, praying

that these twelve defendants might be restricted from acting as directors, and be ordered to deliver up the common seal, and the property and books of the company in their possession, to six other persons, who were alleged to be the only duly constituted directors, was, on both the above grounds, allowed. *Mozley v. Alston*, 1 P. 790.

2. *Directors of company provisionally registered—Winding up—Shareholders—Parties—Breach of trust.*—A bill may be filed against the directors of a provisionally registered railway company, after its dissolution, by some of the shareholders on behalf of all, except those defendants, for the winding up of its affairs, though the bill prays not only the collection of the joint property and its application in discharge of the joint liabilities, but also the distribution of the surplus among the shareholders, in proportion to the amount of their respective subscriptions. In a bill filed against the directors of a provisionally registered railway company by some of the shareholders, on behalf of all except the defendants, for the winding up of its affairs, after stating that a certain number of persons had executed the parliamentary contract as subscribers for certain shares, but that they had not paid their deposits, and that no shares or certificates of shares had been issued to them, it was alleged that the plaintiffs were ignorant of their names and addresses: Held, on demurrer for want of parties, that that allegation was a sufficient excuse for not making those persons defendants, although the Standing Orders required that a copy of the parliamentary contract, containing the names and addresses of all persons who had executed it, should be deposited in the private bill office, and it appeared from statements in the bill that that document had been deposited pursuant to the standing orders, and that the plaintiffs had procured a copy of it. Where a bill by certain persons, on behalf of themselves and others, for relief against an alleged breach of trust, is demurred to, on the ground that some of the parties, on whose behalf the plaintiffs profess to sue, appear to have been implicated in the transaction complained of, the proper test of such objection is to see whether the bill states facts with respect to those parties, which, as against them, would amount to a defence to the suit. *Apperly v. Page*, 1 P. 779.

3. *Provisional committee—Contributions—Parties.*—A member of the provisional committee of an abandoned railway scheme, against whom an action had been brought by a creditor, who was alleged to be also a member of the committee, filed a bill on behalf of himself and all other persons interested as partners in the company, except the defendants (who consisted of the plaintiff in the action and nine other members of the committee), stating that no shares had ever been allotted, but that various sums had been contributed by several members of the committee, whose names the plaintiff did not know, pursuant to a resolution of their board, in trust for the liquidation of the liabilities of the company, and that the defendants had received those sums, and also other property of the company, and were misapplying them; and praying that the same might be properly applied in discharge of the liabilities of the company, the plain-

tiff being willing to pay his due proportion, and that the outstanding property of the company might be got in, and that the action might be restrained: Held (reversing the decision below), that as the alleged contributions appeared to be purely voluntary, the plaintiff had no right to interfere with or ask any relief in respect of them, at all events in the absence of the parties by whom they had been made; and a demurrer for want of parties was on that ground allowed. *Skarp v. Day*, 1 P. 771.

4. *Shares—Option to purchase—Time of the essence of a transaction.*—A railway company having resolved, on the 25th of July, to create a certain number of new shares, gave, at the same time, an option to every registered proprietor to take a certain number of those shares, provided he declared such option on or before the 10th of August following. One of the registered proprietors, who was resident at Naples, was not apprised of the resolutions until the 12th of August. But on that day he wrote to the secretary to the company, declaring his option to take his portion of the new shares: Held, that the time fixed by the resolutions was final, and consequently that the plaintiff's declaration was too late. *Pearson v. The London and Croydon Railway Company*, 14 S. 541.

REALTY.—Contribution—Devise—Admission of assets.—A testator having five estates, devised four of them to four of his sons, charging them with nine-tenths of his debts and children's portions in certain proportions. He devised the fifth estate to X. another son, subject to one-tenth of the portions, but not directing it to contribute to his debts. After disposing of specific portions of his personal estate, he directed that the rest of it should be applied in payment of his just debts, and that such further sum as might be requisite to pay his debts should be raised out of his landed property in the proportions above mentioned. The personal estate being insufficient to pay the debts, it was held that estate X. was charged by implication with one-tenth of the deficiency. By the will of a testator, who died in 1815, his real estates were charged with his debts as far as his personal assets should be insufficient. A creditor brought actions against his executrix, who gave pleas of confession, but then filed a bill against the creditor, and the amount of the demand was ascertained by the master's report. The executrix having no assets to meet the demands, P. advanced the money, and a deed was executed, by which the demands were assigned to P., and the executrix covenanted that whichever of the sons who were entitled to the real estate should first come of age would execute a mortgage to P., and in order to secure the sum advanced she covenanted to insure her life for the amount, and assigned her jointure to secure the regular payment of the premiums, and P. covenanted on payment to reassign to her. The insurance was not kept up, nor the mortgage executed. A suit was instituted by P. to raise the demand out of the realty: Held, that it could not be insisted on the ground that this was a mode of realizing assets, and released the realty by giving time to the personalty, the primary fund, or was the acceptance of a security which was suffered

to be lost: Held also, that the pleas of confession and report were not an admission of assets by the executrix: and held also, that the demand need not be proved de novo against the devisees of the realty. *Terrall v. Blennerhasset*, 9 Ir. E. R. 103.

And see RENT-CHARGE.

RECEIVER.—1. *Appointment—Prior creditor.*—Where a prior creditor applies for a receiver in his cause in this court, there being a receiver in the Exchequer appointed by a puisne creditor, this court will appoint the receiver, the plaintiff undertaking to remove the receiver in the Exchequer, the receiver in this court not to act till then. *Mills v. Mills*, 9 Ir. E. R. 1.

2. *Bidding.*—It is contrary to the practice and policy of this court to permit the receiver in the cause to bid at the sale of the lands over which he had been appointed. *Anderson v. Anderson*, 9 Ir. E. R. 23.

3. *Management of estate—New orders.*—The direction in an order appointing a receiver, that he should manage as well as set and let the estate, authorizes him to propose to the master, from time to time, to make ordinary repairs to the buildings on the estate. *Thornhill v. Thornhill*, 14 S. 600.

4. *Restraining proceedings at law against him.*—The receiver in the cause having distrained for rent due by a tenant who held in reality for the defendant, as it was alleged by the defendant, on lands in the possession of the defendant, and not those over which the receiver was appointed, the court restrained an action of trespass brought by the defendant, and granted the usual reference to the master, there being no good reason to suppose that the receiver acted maliciously or mala fide, or that any substantial damage was sustained by the defendant. *Parr v. Bell*, 9 Ir. E. R. 55.

5. *Tenant's recognizance—Stat. 4 & 5 Will. 4, c. 55.*—The receiver in this cause is the proper person to present the petition and to make the verifying affidavit for a receiver under the 4 & 5 Will. 4, c. 55, upon a tenant's recognizance. *Daly v. Lynch*, 9 Ir. E. R. 2.

And see TITHES.

REMOTENESS. See WILL, 8.

RENEWAL OF LEASES. See TENANT FOR LIFE, 1, 2.

RENT. See LESSOR AND LESSEE. SOLICITOR AND CLIENT, 1.

RENT-CHARGE.—*Issuing out of realty—Pleading—Misjoinder.*—By marriage articles it was covenanted that a lease for lives and a term for years, the property of the intended husband, and also a lease for lives renewable for ever, and a term for years, the property of the intended wife, which were subject to a mortgage, should be conveyed to trustees; and that the intended husband should have power to give, devise, and bequeath the said lands, or such of them as he should then have in his power, to and amongst the issue of the marriage, in such manner and form as he should by deed or will appoint; and in default of appointment, then that the intended wife should have the like power. The mortgaged lands were after-

wards sold under a decree in a foreclosure suit for more than the sum due under the decree. Subsequently a deed of conveyance and appointment was executed, which purported to convey all the lands as if they were still existing interests to a trustee, to the use and intent that E. (a daughter of the marriage), her heirs and assigns, should, during the respective terms for which the lands were holden, have and receive a rent-charge of 36*l.*; and that I. (another daughter), her heirs and assigns, should in like manner have and receive a like rent-charge of 36*l.*, the same to be issuing out of and charged upon all and singular the lands and premises thereby conveyed; and that E. and I., and their respective heirs and assigns, should have powers of distress and entry for the recovery thereof. The surplus purchase money was applied without the privity of the annuitants in obtaining a renewal of the husband's term for years. The husband's freehold for lives determined by the deaths of the *cestui que vie*, and afterwards E. died intestate, and her administrator conveyed her annuity to R., who, together with I., filed a bill to raise the amount of their respective annuities: Held, first, that the rents issued wholly out of the freehold, with, nevertheless, a right to distrain on the leasehold for years. Secondly, that the surplus of the purchase money was impressed with the continuing character of real estate, as far as it was the produce of the freehold for lives; and that that character could not be subsequently varied, as against the annuitants, without their consent. Thirdly, that upon the decease of E. intestate, her rent-charge descended upon her heir-at-law, and that R. was not entitled to it. Fourthly, that where two persons join as co-plaintiffs in respect of separate and distinct titles, neither of them having any interest in the title sought to be enforced by the other, and it appears that one of them has no title, the bill will be dismissed generally, without prejudice to the other co-plaintiff enforcing his title in a separate suit. Fifthly, that the bill was not multifarious. *Semble*, that if a rent be granted to A. and his heirs, to be issuing out of a freehold for lives and a term for years, and the freehold afterwards determines, the rent-charge does not alter its character, and become a chattel interest. *Richardson v. Nixon*, 2 J. & L. 250.

REVERSION. See **HUSBAND AND WIFE**, 2, 3.

REVIVER. See **COSTS**, 4. **PLEADING**.

RIGHT TO BEGIN. See **LUNACY**, 2.

SALE UNDER COURT.—*Practice*—*Master's office*—*Letting*.—The master may, in the exercise of a sound discretion, refuse to declare the highest bidder to be tenant of lands set up to be let under the court; but where the master did not declare the highest bidder to be the tenant, the court, upon the application of the bidder, reviewed the circumstances of the case, and declared him to be tenant at the rent offered by him. *In re Costellos*, 2 J. & L. 244.

SATISFACTION.—*Portions*—*Debt*.—A sum of 1000*l.* was by deed of 1805 vested in A. in trust for his daughter M. G. until she

attained the age of twenty-five years, or married; and after attaining that age or day of marriage, to permit M. G. to receive the interest during her life, and after her decease for her issue, as she should appoint; and in default of appointment, equally; but in case she should die previous to twenty-five, or day of marriage, or without issue, then over to the other children of A. On the marriage of M. G., A. by settlement of 1824 vested in trustees securities for money exceeding 1000*l.*, upon trust for the separate uses of M. G. for her life, and after her decease for the use of the children of the marriage, as the intended husband should appoint; and in default of appointment, equally; and in default of such issue, for the intended husband, his executors, &c. This settlement did not refer to the deed of 1805: Held, that the provision made for M. G. by the settlement of 1824 was a satisfaction on her claims under the deed of 1805, though it did not appear that the husband was aware of his wife's claim thereunder. A provision by a father on the marriage of his daughter of a greater sum than he owes her is in general to be deemed a payment of the debt, and it is not necessary that there should be an express stipulation to that effect, or to show that the husband knew of the debt. *Hayes v. Garvey*, 2 J. & L. 268.

SCHEME. See **CHARITY**, 3, 4, 6.

SCOTCH COURT. See **INJUNCTION**.

SECURITY. See **SOLICITOR AND CLIENT**, 2.

SEPARATE MAINTENANCE. See **HUSBAND AND WIFE**, 1.

SEPARATE USE. See **TRUSTEES**, 5.

SETTLEMENT. See **HUSBAND AND WIFE**, 4.

SHAREHOLDERS. See **RAILWAY COMPANY**.

SOLICITOR AND CLIENT.—1. *Rents.*—Testator devised his freehold lands to his wife and children equally, and appointed her his trustee. Under her marriage settlement the wife was entitled to a sum of 500*l.*, charged on the land, and payable on the death of the testator. She entered into receipt of the rents as devisee and trustee in the will: Held, that as against a subsequent judgment creditor, with whose consent she entered, and who acted gratuitously as her solicitor in the matter of the trusts of the will, she was chargeable only with such parts of the rents as she had received and applied to her own use. *Boyd v. Murdock*, 2 J. & L. 203.

2. *Security.*—A solicitor is not at liberty to deal with his client for a security for a debt due to him by a third person, without giving to his client all the information he possesses connected with his demand and the nature of the security. Therefore where a solicitor took from his client a security on a sum of money charged upon the estate of the principal debtor, for the recovery of which the client was then prosecuting a suit in equity, and did not disclose to him the circumstances connected with that estate, and particularly that he, the soli-

citor, had other demands affecting it, a bill to enforce that security was dismissed with costs. *Higgins v. Joyce*, 2 J. & L. 282.

And see FRAUD. GUARDIAN.

SPECIALTY DEBT. See LESSOR. MORTGAGOR, 2.

SPECIFIC PERFORMANCE.—*Indemnity—Compensation—Pleading.*—Plaintiff by his bill stated that having a charge affecting the lands of M. held by defendant under a lease, an agreement was entered into between them that defendant should, in lieu of plaintiff's charge, grant him an annuity for the lives of himself and his sister, charged on the lands of B. and other properties, including M. Plaintiff afterwards discovered that there were charges outstanding affecting B., when defendant further agreed that a judgment affecting B. should be assigned to plaintiff as a security, which defendant was unable to do; and having broken certain penal covenants in the lease of M., his interest was evicted by the landlord, C., between whom and defendant an agreement was then entered into to give defendant a new lease. The bill charged and stated various acts to show that defendant evaded performing his agreement, and, in order to extinguish plaintiff's claims on the lands, aided C. to evict the interest in them on a previous promise of a new lease, and prayed a specific performance of the agreements, and that the new lease might be decreed liable to plaintiff's demand, and charged with the annuity; and also that if defendant could not fully perform the agreements, by reason of the incumbrances on B. then that he might do so as far as possible, and indemnify plaintiff against incumbrances; and for a reference or issue to ascertain plaintiff's loss, by the inability of defendant to perform his agreement fully; and that defendant should pay the amount. Defendant demurred to the relief and discovery, assigning as causes that part of the discovery sought was immaterial, being in relation to the new lease, as to which plaintiff had no title to relief; and that as the bill prayed specific performance, plaintiff could not seek part performance with indemnity and compensation: Held, that the demurrer in relation to the relief, seeking that the new lease might be liable, could not be sustained, and that the interrogatories being in part material, the plaintiff was entitled to the discovery that the demurrer, so far as related to the relief of part performance with indemnity and compensation, would, if so confined, be good; but the demurrer being bad as to the former part was bad altogether. *Southwell v. Daly*, 9 Ir. E. R. 7.

And see VENDOR AND PURCHASER, 5.

STAYING PROCEEDINGS. See PRACTICE, 7.

TENANT FOR LIFE AND REMAINDER-MAN.—1. *Fines on renewal of leases for lives and years—Apportionment.*—On a devise of successive interests in leases for lives or years, where the testator directs that the leases are from time to time to be renewed without more, the fines and expenses of renewal are to be borne by the tenant for life and remainder-man, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in propor-

tion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities. There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years. If the testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the court will pursue the general rule, which would be adopted in the absence of any direction as to the manner of providing for the fines. Whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, and in cases where such interests are taken under settlements by deed, *quære*. Whether trustees, having power to raise the fines out of the rents and profits, or by mortgage or otherwise, as they should think fit, might so act as to throw the burden on the parties in proportions different from those in which it would be distributed by the general rule of the court, *quære*. *Jones v. Jones*, 5 H. 440.

2. *Same*.—Where the tenant for life pays the whole fine on renewal, he will have a lien on the estate for the proportion, which shall ultimately appear to be chargeable on the remainder-man, or parties entitled in succession; and where the remainder-man renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainder-man for a proportionate part of the fine calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine. *S. C. ib.*

TENANTS IN COMMON. See WILL, 9.

TITHES.—*Receiver*.—The court would not, at the instance of a lay impropriator, appoint a receiver for payment of the rent-charge upon an affidavit merely stating that he was the lay impropriator of the parish, where it appeared that his title to the tithes had been and still were contested by the parishioners, and the only payment he had obtained out of the lands of the respondent was by the hands of a receiver of the court appointed in the suit of a third person. *Greville v. Fleming*, 2 J. & L. 335.

TITLE. See TRUSTEES, 1. VENDOR AND PURCHASER, 1.

TRUSTEES.—1. *Appointment of new trustees—Power—Vendor and purchaser—Title*.—Testator devised his real estates to A., B., C. and D., and their heirs, on certain trusts, which required the legal estate to be vested in them, and gave a power of sale to them or the survivors or survivor of them, or the heirs of the survivor, and declared that their or his receipts or receipt should be a good discharge to the purchaser; and if any of them should die or decline

to act, that it should be lawful, and he thereby willed and directed, that the survivors of them should immediately, or within two months afterwards, by any deed nominate some fit person to be a trustee in his place. D. died; and A. and B. by one deed, and C. by another (both of which were executed more than two lunar months, but not less than two calendar months after D.'s death), nominated a new trustee, but did not convey the legal estate to him. A., B., C., and the new trustee, agreed to sell the estates to M., who objected to complete his purchase; first, because the appointment of the new trustee had not been made within two lunar months; secondly, because it had not been made by one single deed; and, lastly, because the power of sale was suspended during the vacancy in the trust. The court overruled the objections, but held that the new trustee had not been duly appointed, because no conveyance had been executed to him; notwithstanding which, that A., B. and C., could make a good title, and give an effectual discharge for the purchase-money. The court held also that the new trustee, though not duly appointed, might join with A., B. and C., in a suit for a specific performance. *Warburton v. Sandys*, 14 S. 622.

2. *Appointment of new trustees—Power.*—The court, in decreeing the appointment of new trustees, will not direct a power to be inserted in the deed for appointing new trustees toties-quoties. *Borles v. Weeks*, 14 S. 591.

3. *Costs.*—If a trustee has not misconducted himself, even though the court punish him as by making him pay interest on funds in his hands, yet he shall get the costs of the suit; but if his account be greatly reduced in the office, he shall not get the costs of passing it. *Foster v. Andrews*, 2 J. & L. 199.

4. *Same.*—A. assigned leaseholds to B., in consideration of 400*l.* stated to have been paid to him by B. On the next day B. executed a deed, declaring himself to be a trustee of the leaseholds for A.'s wife. The deeds were afterwards declared to be fraudulent and void as against A.'s creditors; and the court refused to give B. his costs, because the declaration of trust recited, falsely, that the 400*l.* was the separate property of A.'s wife, and that B. had received it from her, and B. had signed a receipt for it. *Turquand v. Knight*, 14 S. 643.

5. *Husband and wife—Separate use.*—A money fund belonging to the wife was vested in trustees, upon trust to pay the interest to the husband for his life, or until he should take the benefit of any act for the relief of insolvent debtors; and after his decease, or obtaining the benefit of such act, upon trust to pay the interest to the wife for her life, the same to be paid to her, in case of the insolvency of the husband, to her separate use, and after her decease, in trust for the issue. The trustees, at the instance of the wife, committed a breach of trust, by lending part of the trust funds to the husband, who afterwards was discharged as an insolvent. Upon a bill by the wife and her children to make the trustees answerable for the breach of trust, held that the contingent interest of the wife for her separate use was not

bound to make good to the trustees the money advanced by them at her request. *Quære*, whether her life interest after the decease of her husband was so bound. *Semble*, that if the discharge of the husband as an insolvent had been concerted with the privity of the wife, in order thereby to entitle her to a present interest in the trust funds, and defeat the equity of the trustees against her husband, the trustees would be entitled to the same relief against her as against the husband. *Mara v. Manning*, 2 J. & L. 311.

And see LIMITATIONS, 3. WILL, 10.

UNITARIANS. See CHARITY, 1.

USURY.—*Annuity*.—*Quære*, whether a grant of an annuity for a term of years, which annuity in the course of time will repay the principal money and more than the legal interest, is or is not usurious. *Kinny v. Lynch*, 2 J. & L. 319.

VENDOR AND PURCHASER. — 1. *Bad title — Decree*.—The lands of M., part of the manor of C., were conveyed in 1823 to A. and his heirs, “saving and excepting thereout the manorial rights belonging to the manor of C., and the tolls and duties of the fairs and markets thereof, and also any liberty of turbary or limestone heretofore granted therein or thereout by B. or his ancestors to any of the tenants of the said manor, as expressed in their leases respectively.” There was no limestone or turbary on the lands of M., nor had any manorial rights been exercised for more than twenty years, nor any fair or markets held. In 1845 the lands of M. were set up and sold, as held by a clear indefeasible title in fee-simple. Upon objection to the title, the master in chancery reported the title as bad: Held, upon exceptions to the report, that under the circumstances the saving in the deed did not form any ground for the report of bad title. *Martin v. Cotter*, 9 Ir. E. R. 44.

2. *Purchase-money*.—A lessee assigned the demised premises to A. by way of mortgage, and afterwards made two equitable mortgages of them, one to B. and the other to C., and died. C. agreed to purchase the lease of his executors free from incumbrances, and afterwards took possession of the premises, but did not pay the purchase-money: Held, that as between C. and the executors, the purchase-money must be considered to have been applied on the day on which C. took possession, towards satisfaction of the incumbrances, according to their priorities. *Greenwood v. Taylor*, 14 S. 505.

3. *Purchase without notice*.—A purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title. *Joyce v. De Moleyns*, 2 J. & L. 374.

4. *Rental for sale — Discharge*.—In a rental under which lands were sold, a part was thus described: “Term for which demised: under an article of agreement for lease for four lives, bearing date 1804, and one year.” The sale took place in January, 1845, and on the 9th of April the purchaser’s solicitor received a copy of the article, and then first discovered that the agreement was for a lease, to commence

after the expiration of a then subsisting lease, which did not expire until 1843: and on the 24th of October he lodged objections to the title, and subsequently swore that he was misled by the statement in the rental: Held, that the misstatement was ground for discharging the purchaser, and not for compensation; but that in consequence of the delay of the purchaser in lodging his objection, that he was not entitled to any costs. *Martin v. Cotter*, 9 Ir. E. R. 44.

5. *Specific performance or indemnity—Suit by executor of vendor to compel the purchaser to perform the covenants of the vendor or for indemnity.*—A., B. and C., possessed of a manor under an ecclesiastical lease, agreed with M. to grant him, upon the expiration of a subsisting grant, a copy of court roll of a tenement holden of the manor, and entered into a joint and several bond to perform the contract. A. afterwards conveyed his interest in the manor to B., subject to the agreement with M., and died, having appointed the plaintiff his executor. The validity of the lease constituting the title of B. and C. to the manor was subsequently impeached; and pending the trial of their right to the manor, they were unable to grant the copy of court roll according to the agreement. M. thereupon brought three several actions upon the bond, against the plaintiff, B. and C. respectively. The plaintiff, B. and C. entered into a consolidation rule, whereby they all consented to be bound by the verdict in one of the actions. The plaintiff then filed his bill against B. and C. and M. for a specific performance of the contract by B. and C. and to restrain the action brought by M.: Held, that the question as against M. was the same both at law and in equity, and that having consented to be bound by the verdict in the action, the plaintiff could not sustain the suit, and the bill was dismissed without prejudice to any question of contribution or indemnity as between the plaintiff, B. and C. the obligors in the bond. *Hole v. Pearse*, 5 H. 408.

And see DEBTOR AND CREDITOR, 3. RAILWAY COMPANY, 4 TRUSTEES, 1.

VOLUNTARY SETTLEMENT.—*Covenant for further assurance—Creditor—Administration suit.*—The executors of a person who had entered into a covenant for further assurance in a voluntary settlement having refused to perform it, the Court in a suit instituted by a third party for the administration of the covenantor's estate, would not permit the covenantee to prove as a creditor under the decree in the administration suit, but gave him leave to bring such action as he might be advised. *Hervey v. Audland*, 14 S. 531.

WATERCOURSE. See INCLOSURE ACT.

WILL.—1. *Annuity—Construction.*—Testator bequeathed two leasehold houses to trustees, in trust out of the rents to pay 50l. a-year to his daughter in law so long as she should remain his son's widow, and to invest the surplus in stock, to be held in trust for his wife for life, remainder for his grand-daughters; and after his death, in case his daughter in law should be then married, or after her decease or second marriage, whenever the latter event might happen, to sell the houses and invest the proceeds in stock, to be held in trust

for his wife for life, remainder for his grand-daughters. The daughter in law continued single, and the trustees paid her the 50*l.* a-year out of the rents, and disposed of the surplus in the manner directed until the lease of the houses expired: Held, after the death of the testator's widow, that the stock purchased with the surplus rents was not subject to the payment of the annuity, notwithstanding the lease had expired. *Darbon v. Richards*, 14 S. 537.

2. *Conversion—Construction*.—Testatrix, after expressing her intention to dispose of all her real and personal estate as thereafter mentioned, gave certain legacies, and appointed A. and B. her executors; and gave to them and their heirs all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might at their discretion be sold and converted into money, and the net money to form part of her personal estate; and for those and every purpose connected with her property, whether real or personal, she invested them and the survivor of them, and his heirs, executors and administrators, with her full authority; and she directed that any undisposed-of surplus monies should be paid as any future writing or will direct: Held, that the real estate was converted out and out into money, and subjected, in common with the personal estate, to the payment of the testatrix's debts and legacies. *Flint v. Warren*, 14 S. 554.

3. *Devisavit vel non—Form of issue*.—Form of issue where the entire will is impeached on the ground that the testator was not of sane mind, and particular devises in it are also impeached on special grounds. *Guillamore (Lord) v. O'Grady*, 2 J. & L. 210.

4. *Guardian—Construction*.—Testator directed the trustees of his will to procure a suitable house for the residence of his children (who were infants), and to engage a proper person for the purpose of taking the management and care of the house and of his children during their minorities; and he requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself: Held, that the testator had appointed his wife's sister to be the guardian of his children. *Miller v. Harris*, 14 S. 540.

5. *Personal representatives—Next of kin—Construction*.—Testator bequeathed 800*l.* in trust for his daughter Sarah for life, and after her death he bequeathed it to such of his other children as should be living at her death equally, if more than one; and if but one such child should be then living, then to such only child; and if all his children should be then dead (which event happened), then to his personal representative or representatives, and he directed the trustees to transfer the stock accordingly. Sarah and the testator's other children were his next of kin at his death: Held, that their personal representatives, and not his next of kin at Sarah's death, were entitled under the ultimate bequest. *Nicholson v. Wilson*, 14 S. 549.

6. *Precatory trust—Joint tenancy—Construction*.—Testatrix willed that after payment of her legacies the whole of her property should be given to her sister Mary, to be hers independent of any husband: and earnestly recommended her to take such measures as

she might deem best for making it sure, that whatever she might inherit might go at her decease to her children: Held, that the children, on their mother's death, were entitled to the property as joint tenants absolutely. *Cholmondley v. Cholmondley*, 14 S. 590.

7. *Precatory words—Trust—Quia timet—Demurrer.*—A direction in a will that a certain person should be employed as agent and manager of the testator's estates, whenever his trustees should have occasion for the services of a person in that capacity, held not to create a trust which such person could enforce. *Finden v. Stephens*, 2 P. 142, (accidentally omitted from the last Digest).

8. *Remoteness—Construction.*—Testator gave all his real and personal estate to trustees, their heirs, executors, &c., in trust to pay, divide and distribute the income, rents, interest and profits unto and equally amongst all his children whose names he mentioned, and such other children as he might have, or as should be in ventre de sa mere at his death, share and share alike; the shares of his daughters to be paid to them half-yearly for their separate use; and if any of his children should die in his lifetime without leaving issue, he gave their shares to their survivors, but if leaving issue, then to their issue, and in case any of his children and their issue should die in the lifetime of any husband or wife with whom his children should have intermarried, he gave their shares to his surviving children and to the issue of such of his children as should then be dead; it being his will that none of his sons' wives or daughters' husbands should become heirs to their children's property, and that none of his children should sell any part of his estates. Some of the testator's children died in his lifetime, but without issue: Held, first, that each of the surviving children was entitled to a share of his property, not for life merely, but in fee; secondly, that the gift over in case any of his children and their issue should die in the lifetime of any husband or wife with whom his children should have intermarried, was too remote. *Hodson v. Ball*, 14 S. 558.

9. *Tenancy in common—Construction.*—Testator devised his copyhold and leasehold estates in trust for his son for life, and after his decease in trust to assign and surrender the same unto and among the person or persons, who, at the son's death, would be entitled to his personal estate in case he should die intestate. The son died, leaving a widow and four children: Held, that they took the estates in equal fifth parts, as tenants in common. *Richardson v. Richardson*, 14 S. 526.

10. *Trust for payment of debts—Breach of covenant.*—Damages for breach of a lessor's covenant for quiet enjoyment broken after the lessor's death: Held a debt within a trust in his will to pay all such just debts of every kind as he should happen to owe at his decease, the context showing an intent to include any debt payable out of his personalty; and *semble* even without the latter circumstances. *Bermingham v. Burke*, 9 Ir. E. R. 86.

And see PRACTICE, 8.

WITNESS. See EVIDENCE, 1, 2.

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Digest of Cases.

COMMON LAW.

Comprising the Common Law Cases (not previously inserted) in the following Reports:—

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3 Com. B. part 1.	4 Dowl. & L. parts 2 & 3.
15 M. & W. part 4.	9 Ir. Law Rep. parts 3, 4 & 5.

ABATEMENT. See **LIBEL AND SLANDER**, 5, 6.

ACCEPTANCE. See **FRAUDS, STATUTE OF.**

ACCOUNT STATED. See **PLEADING**, 1.

ADVOCATE. See **ATTORNEY.**

AFFIDAVIT.—1. *Certiorari—Entitling affidavit.*—Affidavits in support of a rule for a certiorari ought not to be entitled at all; and where they were entitled “In the matter of the Queen v. Robert Wallwork (the name of the proceedings in the court below, which it was sought to bring up, being the Queen v. Robert Wallwork and James Wallwork), the court held them irregular, and discharged the rule. *Ex parte Wallwork*, 4 D. & L. 403.

2. *Entitling affidavit.*—Affidavits on which a rule, calling on an attorney to answer the matters in the affidavit, has been granted, need not be entitled at all; but affidavits in answer to the rule must be entitled in the same way as the rule. Where, however, they were not so entitled, the court enlarged the rule, in order that they might be amended. *In re Grantham*, 4 D. & L. 427.

3. *Same.*—A defendant was called in the writ of summons W. W. Kilpin; he entered an appearance as William Wells Kilpin. In the title of an affidavit in support of a rule for judgment as in case of a nonsuit, he was described as William Wells Kilpin: Held, that the affidavit was well entitled. *Lomax v. Kilpin*, 16 M. & W. 94; 4 D. & L. 295.

4. *Jurat—Affidavit.*—Where a rule is obtained on an affidavit, by two or more deponents, the jurat of which is defective in not containing the names of the deponents, pursuant to Reg. Gen. Trin. Term, 1 Geo. 4, the court will discharge the rule with costs. *Cobbett v. Oldfield*, 4 D. & L. 492.

And see **ARREST. MALICIOUS ARREST**, 2. **SCI. FA.**

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AIDER BY VERDICT. See **MALICIOUS ARREST**, 1.

AMBIGUITY. See **CASE**, 1. **CONTRACT**, 1.

AMENDMENT.—*Of pleadings, refused after judgment and the lapse of a year.*—The court refused to allow a replication to be amended after the lapse of a year after judgment pronounced on demurrer, the case having previously stood over that the parties might mutually agree to amend, and both having declined so to do. *Hammond v. Colls*, 3 C. B. 212.

And see **PRACTICE**, 1. **PROCESS**, 1.

ANNUITY.—*Enrolment—Plea of accord and satisfaction by grant of annuity answered by replication showing that the annuity deed had been rendered unavailing as a satisfaction by the act of the defendant himself.*—In debt for money had and received, &c., the defendant pleaded that after the accruing of the debt and causes of action, the defendant executed a deed, securing to the plaintiff a certain annuity, and that the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of all the said several debts and causes of action. The plaintiff replied that no memorial of the annuity deed was enrolled pursuant to the statute; that the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that the defendant pleaded in bar of that action the non-enrolment of the memorial, and that thereupon the plaintiff elected and agreed that the indenture should be null and void, as pleaded by the defendant, and discontinued the action: Held, a good answer to the plea, inasmuch as it showed that the accord and satisfaction thereby set up had been rendered nugatory and unavailing by the act of the defendant himself. *Turner v. Brown*, 3 C. B. 157; 4 D. & L. 201.

APPEARANCE. See **PRACTICE**, 2, 3.

ARGUMENTATIVENESS. See **BILLS AND NOTES**, 6.
DETINUE. **PATENT**, 2, 3. **PLEADING**, 2, 5.

ARREST.—*Judge's order for arrest—Appeal to court—Affidavit.*—A party arrested by order of a judge may apply for his discharge either to the court or to another judge, and may, on such application, use affidavits to contradict or explain those on which the order was granted, and he may appeal to the court against the decision of such latter judge. If the judge secondly applied to should differ from the first, or if it should appear on fresh affidavits that the person arrested was about to quit England at the time those affidavits were made, though he was not so when the order was made, *quære* whether in such cases the judge or court ought to discharge him? An affidavit that deponent "has been informed and believes" that a party is about to quit England, is insufficient to warrant an order for arrest. Where an order to hold to bail has been improperly made by a judge, the court will not set aside the *capias*, but only discharge the defendant out of custody. Where a defendant, against whom a *capias* has issued under a judge's order,

applied to the court to have the money returned, on the ground that he was not about to quit the country, and the affidavits in answer were contradictory, the court referred the matter to the master for inquiry. *Graham v. Sandrinelli*, 4 D. & L. 317.

And see COSTS, 2. MALICIOUS ARREST. PROCESS, 1, 2.

ASSIGNEE. See PLEADING, 10.

ASSIGNMENT.—*Of chattels—What is a present conveyance—Demise by mortgagee to mortgagor—Prospective operation of assignment.*—A., to secure the payment of 518*l.* by him to G., assigned by indenture of January 1st, 1843, all his goods and farming stock, which were then or which at any time during the continuance of that security should be in, about and belonging to A.'s house and farm, to G., his executors, &c., as his and their own proper goods and chattels. Proviso that if A. should pay G. the 518*l.* on 1st January, 1845, or at such earlier day and time as G., &c., shall appoint by notice in writing to A. at least ten days before the time to be appointed, with interest in the meantime, then those presents should cease and determine. A. covenanted to pay principal and interest accordingly; and it was declared that after default, and as respected the interest, after notice in writing requiring payment, it should be lawful for G., &c., to receive and take into their possession, and thenceforth to hold and enjoy the said goods, &c.; and also to sell and dispose of the same and every part thereof, and out of the proceeds to retain the principal and interest and expenses, and to render the surplus to A., &c.; and that until default it should be lawful for A., &c., to hold, make use of, and possess the goods, &c., without disturbance by G., &c. A. not having paid the interest, G., without giving notice in writing, on 1st January, 1844, took possession of all the goods, &c., then in and about the house and farm, including the last year's crop of hay, and some other articles which were not A.'s at the time of the assignment, but had been brought by him into the farm since. On G.'s entering to take possession, A. delivered to him part in the name of the whole, and signed a memorandum of the delivery, acknowledging that he made default in payment of the principal and interest, after receiving due notice to pay. On a feigned issue to try whether the goods, &c., or any part of them, were the property of G. at the time of the delivery to the sheriff after 1st January, 1844, of a *fi. fa.* against A. at the suit of another creditor: Held, that the assignment was a present conveyance from A. to G., so as immediately on the execution of the indenture to vest the property in the goods, &c., then in and about the house and farm, in G.; and that the proviso did not operate as a demise of those goods, &c., to A.; but that the deed did not operate as an assignment of property thereafter to arise or be brought upon the premises. *Gale v. Burnell*, 7 Q. B. 850.

ATTACHMENT. See TRESPASS, 1.

ATTESTATION. See COGNOVIT, 1. WARRANT OF ATTORNEY.

ATTORNEY.—Advocate—Witness.—Where a party makes a speech and conducts a case as an advocate he cannot afterwards give evidence as a witness in the same cause. In an action tried before the undersheriff the attorney for the plaintiff opened the case to the jury, examined the witnesses, made a speech in reply, and afterwards proposed to call himself as a witness to refute the defence. His evidence was objected to by the defendant, but received by the undersheriff, and a verdict was returned for the plaintiff: Held, that the court would grant a new trial. *Stones v. Byron*, 4 D. & L. 393.

And see **PRACTICE**, 4. **RELEASE**, 1. **SHERIFF**, 1. **TRESPASS**, 2. **VENUE**, 1.

AUCTIONEER.—Sale under decree.—A special bailiff, nominated by the plaintiff and appointed by the sheriff, is not entitled to sell by way of auction goods taken in execution under a civil bill decree, without being licensed as an auctioneer or procuring the assistance of a licensed auctioneer. *Attorney-General v. Malone*, 9 Ir. L. R. 245.

And see **COGNOVIT**, 4.

AWARD. See **COSTS**, 3.

BAIL. See **ARREST**.

BAILIFF. See **AUCTIONEER**. **SHERIFF**, 1.

BANKRUPT.—1. Bankrupt act—Costs—Speedy execution.—Where a judge *a nisi prius* has granted a certificate for speedy execution, and judgment has been signed thereon, and the costs taxed, an application by the defendant for costs, under the 19th section of the 5 & 6 Vict. c. 122, must be made within the first four days of the ensuing term; in other cases such application must be made before final judgment. *Quære*, whether the 19th section of the 5 & 6 Vict. c. 122, applies to any case except where a bond is given under the 13th section. *Smith v. Temperley*, 4 D. & L. 510.

2. *Persons "suspected" within stat. 6 Geo. 4, c. 16, s. 33.*—*Who must entertain the suspicion.*—For the granting of a summons under stat. 6 Geo. 4, c. 16, s. 33, to bring before commissioners a person "known or suspected" to have property of the bankrupt in his possession, *semble*, per Lord Denman, C. J., and Williams, J., and held by Coleridge, J., that the suspicion required is that of a party applying for such summons and not of the commissioner. *Cooper v. Harding*, 7 Q. B. 928.

3. *Proveable debt—Unliquidated damages.*—The defendant entered into a charter-party with the plaintiffs, by which he bound himself to supply a cargo of guano. An action was brought against him for an alleged breach in not supplying the cargo in pursuance of his agreement, and he suffered judgment by default. Before the execution of a writ of inquiry a fiat in bankruptcy issued against him, and he obtained his certificate with a suspension for six months. The damages were afterwards assessed at 1044*l.* 3*s.* 9*d.*, and for that amount he was arrested: Held, that this was a debt not proveable

under the fiat, and consequently that the defendant was not entitled to be discharged. *Woolley v. Smith*, 4 D. & L. 469.

4. *Reputed ownership—Trover.*—The policy of the bankrupt code is to prevent the relation to a secret act of bankruptcy more than two months old from the commission, so as to avoid all intermediate bonâ fide dealings. Where, therefore, prior to an act of bankruptcy, B., a trader, had executed a mortgage of a house and furniture to A., with liberty to A. to enter and take possession of the house and furniture, in case of default in payment of the interest by B. at a certain time after it became due; B. made default in payment of the interest at the time specified, and subsequently thereto committed an act of bankruptcy, of which A. had no notice: Held, that this was a conveyance, contract, dealing and transaction by and with the bankrupt, and having been entered into more than two months before the issuing of the commission was protected by the 95th section of the Bankrupt Act. *O'Connor v. Harris*, 9 Ir. L. R. 217.

BILLS AND NOTES.—1. *Bill of exchange—Notice of dishonour by post.*—If a notice of dishonour of a bill of exchange be posted by the holder in due time, he is not prejudiced if through mistake or delay of the post office it be not delivered in due time. *Woodcock v. Houldsworth*, 16 M. & W. 124.

2. *Promissory note—Delivery of note in payment of debt—Plea.* Debt by payee against maker of a promissory note, with counts for money lent, interest, &c. Plea, as to 100*l.*, parcel of the moneys in the second and subsequent counts, that defendant, before the commencement of the suit, made his promissory note for payment to the plaintiff's order of 100*l.*, six months after date, and delivered the same to the plaintiff, who then took and received the same for and on account of the said sum of 100*l.* Replication, that the period of six months specified in the said note expired before the commencement of the suit, and the notes became then due and payable; yet the defendant hath not paid the same. On demurrer to the replication, Held, that the plea was bad, as it did not aver that the note was not due or that it had been indorsed to a third person. *Semble*, that the plea was not bad for omitting to state that the note was given as well as received on account of the debt. *Price v. Price*, 4 D. & L. 537.

3. *Promissory note—Indorsee—Notice of dishonour.*—In an action by indorsee against indorser of a promissory note, the declaration alleged that neither at the time when the note was made, nor afterwards and before it became due, nor when it became due and on presentment for payment, had the maker or payee any effects of the defendant in his hands; nor was there any consideration or value for the making of the note, or for the payment thereof, or for the indorsement by the payee to the defendant; and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note: Held bad on special demurrer, as it was consistent with the averments in the declaration, that the note might have been indorsed by the defendant for the accommodation of a prior

party or some third person, in which case the defendant would be entitled to notice of dishonour. *Carter v. Flower*, 4 D. & L. 529.

4. *Promissory note—Rule to compute—Production of note.*—On a reference to the master to compute principal and interest in an action against the maker of a promissory note it is unnecessary to produce the note; consequently a variance between the initials of the Christian names on the note stated in the declaration and on the one which has been unnecessarily produced is immaterial. *Davis v. Barker*, 4 D. & L. 468.

5. *Promissory note, what is.*—The following instrument was held not to be a promissory note: "*Drury v. Vaughan*. In consideration of W. Drury not taking any further proceedings in the above actions I hereby undertake with the said W. Drury that I will pay him 3*l.* 5*s.* every quarter of a year from this day, until the whole of the principal money now due from Messrs. J. and T. Vaughan to Mr. Drury, 26*l.* 1*s.*, with lawful interest, be paid and satisfied; the first of such quarterly payments to become due on the 30th October next. It is understood that this undertaking is not to be a release or discharge of the note signed by Messrs. Vaughan to the said W. Drury on &c., but as an additional security for the above-mentioned amount now due on such note with the interest." *Drury v. Macaulay*, 16 M. & W. 146.

6. *Promissory note, what is negotiable within the statute of Ann—Argumentative traverse.*—Assumpsit. Declaration stated that defendant made his promissory note and thereby promised to pay to his order 500*l.* two months after date, and indorsed it to plaintiff. Demurrer on the ground that a note payable to the maker's order was not a legal instrument and could not be negotiated: Held, that the count was bad, for the instrument declared on as indorsed to plaintiff was not a promissory note within stat. 3 & 4 Anne, c. 9, s. 1. The second count stated that defendant made his other promissory note, and thereby promised to pay the bearer 500*l.* two months after date, that defendant delivered the same to plaintiff, who was and still is the bearer thereof. Plea, that defendant made a certain instrument whereby he promised to pay to the order of him the defendant 500*l.*, as alleged in the first count, without this, that he made any other promissory note whereby he promised to pay the bearer the sum of money mentioned in the second count, as in that count alleged: Held bad on demurrer, as amounting to an argumentative denial of defendant's having made the note. *Flight v. Maclean*, 16 M. & W. 51.

And see GUARANTEE, 2. HUSBAND AND WIFE, 2. PAYMENT INTO COURT, 4. PRACTICE, 1.

BOND.—1. *Construction of—Principal and surety.*—The defendant entered into a bond to the plaintiffs in the penal sum of 250*l.*, which recited that whereas R. J. had agreed to become tenant to the plaintiffs of a public house, and it was stipulated on the letting that R. J. should take from the plaintiffs all the ale, spirits, &c., which should be consumed on the premises, and that he should become bound with a surety to pay for all ale, &c., which he should receive

from the plaintiffs to the amount of 50*l.* before he should have a fresh supply from them of the same, and so should continue to do from time to time so long as he should continue tenant of the plaintiffs, and that when he should cease to be such tenant the surety should be liable to the plaintiffs for such sum, not exceeding 50*l.*, which the said R. J. should or might then owe to the said plaintiffs for ale, &c., supplied by them to him. The condition then was, that if R. J. should from time to time pay to the plaintiffs for all the ale, &c., which he should from time to time have had from them to an amount not exceeding 50*l.*, before he should have had a fresh supply of the same, and when he should have become indebted to them in that sum, and if the said R. J. should pay the plaintiffs all sum and sums of money which he should owe them for ale, &c., not exceeding 50*l.*, when he should cease to be their tenant, the bond to be void: Held, that under the bond the surety was not liable for any sum not exceeding 50*l.* which R. J. might owe the plaintiffs at the end of the tenancy, although he might have had from them a further supply of ale, &c., at a time when he owed them 50*l.* and upwards. *Seller v. Jones*, 16 M. & W. 112.

2. *Staying proceedings in action on, under 4 & 5 Ann. c. 16, s. 13.*—The court will not interfere under the statute 4 & 5 Ann. c. 16, s. 13, to stay the proceedings in an action upon a bond where it is at all doubtful that the payment stipulated by the condition is not subject to a contingency. *Robinson v. Brown*, 3 C. B. 54.

And see PLEADING, 5.

BOROUGH RATE. See MUNICIPAL CORPORATION.

CA. SA. See PROCESS, 2.

CASE.—1. *Election of members of parliament—Liability of returning officer for refusing the vote of a party whose name is on the register, and wrongfully holding a scrutiny—Pleading—Ambiguity.*—In case against a returning officer for refusing to admit the plaintiff's vote at an election of a borough member, the first count, after stating the writ and precept for the election, alleged that the plaintiff was a burgess, that his name was on the register of voters, that he tendered his vote for one of the candidates, and answered in the affirmative the questions authorized by the 6 & 7 Vict. c. 18, s. 81, to be put by the returning officer, and was ready and offered to take the oath prescribed by sect. 82; but that the defendant being returning officer, wrongfully, fraudulently, and wilfully intending to injure the plaintiff, and to hinder and disappoint him of his privilege of and in the premises, refused to permit the plaintiff to give his vote, or allow the same to be entered and recorded, and a burgess was elected, the plaintiff being so excluded from giving his vote. To this count the defendant pleaded that the plaintiff was not a burgess of the borough duly qualified or entitled to vote in or at the election therein mentioned: Held, that the plea was bad for ambiguity. *Pryce v. Belcher*, 3 C. B. 58; 4 D. & L. 238.

2. *Same.*—The second count, after stating the writ and precept

and that the plaintiff was a burgess and on the register, proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in the poll-books; that he was requested so to do, but that he contriving and wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff, and to hinder and disappoint and deprive him of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books to the end and intent aforesaid, refused to receive the same, or to admit and allow the same to be entered and recorded, to the end and intent aforesaid, but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of votes tendered in the poll-books, and at the close of the poll refused to reckon, include and cast-up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate; whereby the plaintiff was deprived of the benefit of his right to vote at that election. *Semble*, that the count disclosed a *prima facie* cause of action. *S. C. ib.*

3. *Same.*—The third count, after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote, alleged that it was the duty of the defendant, as returning officer, to enter the vote on the poll-books without entering into or allowing a scrutiny; but that the defendant knowing the premises, but contriving and wrongfully, fraudulently, wilfully and maliciously intending to injure and damnify the plaintiff, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, wrongfully ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and wrongfully took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at the election; whereby the plaintiff was delayed, hindered and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that parliament, the plaintiff's vote being so hindered and obstructed, &c.: Held, that this count also disclosed a *prima facie* cause of action, inasmuch as it was possible that the delay arising from the holding of a scrutiny, which is prohibited by 6 & 7 Vict. c. 18, s. 82, might have had the effect of preventing the plaintiff from exercising his right of voting, and, if so, that the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff: Held also, that the words subsequent to the *per quod* amounted to an averment of matter of fact, and were not mere matter of legal inference from the preceding allegations. *S. C. ib.*

4. *Nonfeasance—Breach of duty implied by law—Pleading—What evidence admissible under not guilty in case for a tortious misfeasance.*—A gas company, incorporated by act of parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied

gas to a house belonging to the plaintiff; the only means of shutting it off being by a stop cock within the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the company that he should not require any further supply, and one of the workmen, at his request, removed a chandelier from one of the rooms, leaving the end of the pipe properly secured. The internal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas, by some unexplained means, escaped, and an explosion took place, by which the house was considerably damaged. In case against the company, alleging a breach of duty on their part in not taking proper means to prevent the influx of the gas into the house, the judge having upon the above facts directed a nonsuit, the court declined to interfere. Negligence on the part of the plaintiff was held to be an admissible defence under the plea of not guilty. *Holden v. The Liverpool Gas Company*, 3 C. B. 1.

5. *Pleading—Declaration in case against wharfinger for injury to vessel at his wharf.*—Declaration in case stated that the defendant was possessed of a wharf for the loading and unloading of vessels on the banks of the Thames, near which there was a certain woodwork, before then placed by the defendant and then being upon the bottom of the river, over which at certain states of the tide the vessel of the plaintiff thereafter mentioned would float, but at others not; that while the defendant was so possessed of the wharf the plaintiff was possessed of a vessel, then being, by the sufferance and permission of the defendant, at and alongside the said wharf, for reward to the defendant in that behalf, and the defendant then had the management and control of the said wharf, and the mooring and stationing of vessels at and near the same, while they were at the said wharf for the purpose of using the same. Breach, that the defendant unskillfully and negligently placed, moored and stationed the plaintiff's vessel in the part of the river near the said wharf, and over the said woodwork, and unskillfully and negligently detained the vessel there for a long time until on the natural fall of the tide she fell and lodged against the said woodwork, and was damaged thereby: Held, on motion in arrest of judgment, that this count sufficiently stated a duty in the defendant safely to moor and station the plaintiff's vessel, and a breach of that duty. *Wood v. Curling*, 15 M. & W. 626.

And see MALICIOUS ARREST. SHERIFF, 2.

CERTIORARI.—*Presentment.*—On an application for a certiorari to bring up a presentment, the court will not go behind the presentment to see whether it has been properly obtained. *In re Quin*, 9 Ir. L. R. 160.

CHALLENGE. See JUROR.

CHANGING VENUE. See VENUE.

CHARGE ON LAND. See USURY.

CHARGING ORDER.—*Service.*—Where an order has been obtained under 3 & 4 Vict. c. 105, s. 23, to make a judgment a charge on government stock, personal service of that order on the consignor

of the judgment, who was resident out of the jurisdiction and entitled to the stock, held sufficient. *Wheelhouse v. Sharpe*, 9 Ir. L. R. 154.

CHARTER-PARTY.—1. *Construction of.*—A charter-party provided that the ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load from the factors of the charterers a full cargo of guano or other lawful produce, which the charterers bound themselves to provide; and being so loaded, should proceed therewith to a safe port in the United Kingdom, and deliver the same upon being paid freight at 3*l.* 18*s.* per ton; the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances of three months, or cash equal thereto, &c. And it was further agreed, that in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, &c., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the custom-house, London, and to terminate upon the vessel's return to her port of delivery, as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owners in cash, on account, three months' pay for the hire of the vessel, and the balance to be paid on the vessel's return as aforesaid. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed, pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a license to load a cargo there. The vessel accordingly sailed for the Cape, but, being there required to enter into an engagement to sign and deliver over bills of lading for the cargo, as a security for the charges of the license, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo; and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charter-party. Held, that under such circumstances, the latter clause had come into operation, and that the time freight was recoverable. *Fennick v. Boyd*, 15 M. & W. 632.

2. *Same.*—The vessel having loaded a cargo of guano at Saldanha Bay proceeded therewith to England, and under the charterers' in-

structions went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that without prejudice to the charter-party, or any dispute connected with the vessel, their wishes were that it should be landed and warehoused in the Southampton Docks in bulk, which was accordingly done. Held, that upon such landing of the cargo, the balance of the freight became payable. *S. C. ib.*

CHURCHWARDENS, &c. See COPYHOLD. LANDLORD AND TENANT, 6.

COAL LEASE.—*Construction of—Covenant—Pleading.*—Declaration in covenant stated that plaintiff by indenture granted all the coals and mines of coal under certain lands; that defendant covenanted to pay to plaintiff, as the price of the coal so granted, 40*l.* for every statute acre of the said coal which should be found under the said lands; and until the said price should be fully paid, to pay plaintiff 40*l.*, part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of the said coal should be gotten in every such year or not. Averment, that at the making of the indenture, there were under the said lands divers, to wit, fourteen acres of the said coal, and that divers, to wit, thirteen acres of the said coal still remained under the said lands; and that 40*l.* for two of the half-yearly instalments of the said price for the coal aforesaid became due and still was in arrear and unpaid to the plaintiff. Held, on motion in arrest of judgment, that the declaration was bad for not averring that coals had been found under the premises. *Jonett v. Spencer*, 15 M. & W. 662.

COGNOVIT.—1. *Attestation.*—A cognovit was attested thus: "Duly executed by the above named R. G. in the presence of me the undersigned S. B., attorney on behalf of the said R. G. expressly named by him, and attending at his request; and I do hereby declare that I subscribe my name as witness to the due execution hereof by the said R. G. and as his attorney; and that previous to the execution hereof by the said R. G., I informed him of the nature and effect hereof. S. B., attorney, Birmingham." Held, sufficient. *Phillips v. Gibbs*, 4 D. & L. 275.

2. *Creditor accepting security*—6 Geo. 4, c. 16, s. 8.—The 6 Geo. 4, c. 16, s. 8, forfeits the debt of a party striking a docket, and afterwards accepting a security, only where a commission issues under the docket. Therefore the debt is not forfeited as respects the assignees of subsequent creditors appointed under a commission issued on a docket subsequently struck. The defendant being indebted to the plaintiff and other parties, and having become insolvent in May, 1837, it was agreed between the plaintiff and the defendant, that the defendant should offer a composition of 10*s.* in the pound to his other creditors, but that the plaintiff should not come in under that arrangement, it appearing that otherwise the defendant's assets would produce a much earlier dividend. The plaintiff struck a docket against the defendant to protect him against such creditors as would not

agree to the composition, but no fiat was issued. The creditors, however, all came in, and a trust deed was executed in December, 1837, under which they received between that time and the August following the full amount of 10s. in the pound on their respective debts. In September, 1838, the plaintiff brought the present action against the defendant, who, on the 29th of September, gave a cognovit. On the 17th of October following judgment was signed upon it; and in December, 1845, a fieri facias was sued out, and the defendant's goods seized. On the 28th of February, 1846, a fiat in bankruptcy issued against the defendant. Held, on motion by the assignees to set aside the judgment and execution, that the debt was not forfeited under the 6 Geo. 4, c. 16, s. 8. *Bushell v. Borr*, 4 D. & L. 359.

3. *Filing*.—A cognovit upon which judgment is signed within twenty-one days after its execution is valid notwithstanding that it has not been filed in pursuance of the 3 Geo. 4, c. 39, s. 3, or the Reg. Gen. Hil. Term, 2 & 3 Geo. 4. *S. C. ib.*

4. *Sale under fi. fa.—Expenses of*.—A motion to return auction fees, &c. on the ground that the goods were transferred by the sheriff by bill of sale, to the plaintiff, who employed the auctioneer, and that the auctioneer was employed by the latter, should be made against the sheriff, and not against the plaintiff in the action. *S. C. ib.*

COMMITMENT. See SMALL DEBTS ACT.

COMPOSITION DEED. See PRINCIPAL AND SURETY.

CONDITION. See PLEADING, 9, 10.

CONSIDERATION. See GUARANTEE, 1.

CONSPIRACY. See LIBEL AND SLANDER, 1.

CONTRACT.—1. *Ambiguity—Parol evidence*.—The defendant by a written contract agreed to sell the plaintiff 60 tons of "ware potatoes," at 5*l.* per ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, wares, middlings and chats, wares being the largest and best. Held, that evidence was not admissible to show that the plaintiff had in fact contracted for the sale to him of a particular kind of ware potatoes, viz. Regent's wares, while those offered to him by the defendant were of an inferior kind, viz. kidney wares. *Smith v. Jeffries*, 15 M. & W. 561.

2. *Contract for assignment of lease and sale of fixture, here enforced*.—A., the lessee for years of premises under a lease containing a stipulation that all improvements made by him were to belong to the lessor at the end of the lease, except any greenhouse he might erect, bargained with B. to assign the lease to him and to sell him a greenhouse which was affixed to the freehold, together with the furniture, crops of fruit and plants thereon, for a certain sum. B. was let into possession of the greenhouse and its contents; but owing to a difficulty in obtaining the lessor's consent, no assignment of the lease was made to him. Held, that the contract was an entire one for the assignment of the lease and the sale of the green-

house, and that until the lease was assigned, B. could not be sued by A. for the price of the greenhouse. *Sleddon v. Cruikshank*, 16 M. & W. 71.

CONVEYANCER. See LIEN.

COPYHOLDS.—*Statute 59 Geo. 3 not applicable to.*—The stat. 59 Geo. 3, c. 12, s. 17, vesting lands, &c. in parochial officers, does not apply to copyholds. *Doe d. Bailey v. Foster*, 3 C. B. 215.

And see CUSTOMARY TENEMENTS.

COSTS.—1. *Abortive special case.*—Where, upon the moving of a rule for a new trial, the parties agree to state a special case, nothing being said about the costs, but no case is ultimately agreed upon, the costs of such abortive case are not costs in the cause. *Foley v. Botfield*, 16 M. & W. 65; 4 D. & L. 328.

2. *Arrest—Practice.*—Where a defendant had been arrested and had lodged in court a sum of money in lieu of special bail, and judgment had been marked on a verdict found for an amount less than the sum claimed by the plaintiff, and the costs had been taxed and certified: Held, that an application by the defendant under the 43 Geo. 3, c. 46, s. 3, that he should be allowed the costs of the trial, was too late. *Solomon v. Pitt*, 9 Ir. L. R. 172.

3. *Award.*—By an order of nisi prius a case was referred to arbitration, it having been consented that a verdict should be taken for the plaintiff for the sum claimed by him with costs, subject to be reduced or turned into a verdict for the defendant with costs, according to the finding or award of the arbitrators; the award reduced the amount of the verdict so entered for the plaintiff, but was silent on the subject of the costs: Held, that the plaintiff was entitled to the costs of the reference and award, in addition to the costs of the action. *Fairbrother v. Kingston*, 9 Ir. L. R. 268.

4. *Ejectment—Order in Chancery.*—The costs incurred in obtaining an order in the Court of Chancery for liberty to bring an ejectment in the name of a receiver in a cause, are necessary costs in the ejectment suit, and the landlord is entitled thereto. *Hitchingham v. Hawkes*, 9 Ir. L. R. 158.

5. *Postponement of trial—Costs of witness.*—A trial was postponed, on the application of a defendant, from the summer to the spring assizes. Proceedings were afterwards stayed on payment of debt and costs. The court held that the master was right in allowing subsistence-money to a material witness, detained by the plaintiff from the time of his first attendance, pursuant to the subpoena, to that of settling the action. *Evans v. Watson*, 4 D. & L. 193.

6. *Taxation, notice of.*—Where a party obtains an order for the postponement of the trial of a cause on payment of costs of the day, he must give notice of taxation of such costs, otherwise the other party may go on to trial. *Waller v. Joy*, 16 M. & W. 60; 4 D & L. 338.

7. *Taxation—Notice of action.*—The Great Western Railway Company is bound by its acts of parliament to charge all persons

sending goods by it at equal rates. In assumpsit for money had and received, to recover the difference between the sums charged the plaintiff and those charged by the company to other persons for the conveyance of goods, it was held that the charges so made must be considered as something done under the act by which they were incorporated, and consequently that under sect. 223 they were entitled to notice of action, and therefore that the master was right in allowing the plaintiff the costs of a notice of action. The court refused, on a motion to review the taxation, to entertain an objection to the amount of the costs of the notice of action so allowed, as that objection had not been taken before the master. *Kent v. The Great Western Railway Company*, 4 D. & L. 481.

And see **BANKRUPT**, 1. **NEW TRIAL**. **DISCONTINUANCE**. **PAYMENT**, 2.

COURT OF REQUESTS. See **MIDDLESEX COURT OF REQUESTS**.

COVENANT.—*Increased rent—Liquidated damages.*—In covenant by lessor against lessee, the lease, besides the usual reservation of an annual rent of 528*l.* 14*s.* 7½*d.*, and a covenant against assigning or subletting, contained a covenant, whereby it was agreed "that the lessee should not during the term plough, turn up, or convert into tillage any part of the lands, except a field therein mentioned, nor cut or save or take away from the demised lands any part of the grass meadowing or hay which might be growing upon the upland parts of said premises called the Bullock Park, nor any part of said premises except on, &c.; and in case the lessee should assign or let, or should plough, turn up, or convert into tillage any part of said premises save as hereinbefore mentioned, or should cut, save, or take away any part of the hay or meadowing which might be growing on the said premises called the Bullock Park, or any other part of said premises than the place previously excepted, save by the permission of the lessor, then in any of those cases the lessee, &c. should thenceforth, during the remainder of the term, pay and yield up to the lessor, &c. the yearly rent or sum of 1057*l.* 9*s.* 3*d.* for the said demised premises, in the room and stead of the yearly rent first thereby reserved and made payable; such last mentioned yearly rent to be recovered and recoverable by distress, and by all means whereby the rent therein first reserved was or might be recovered, and to be paid and payable at the time and in the manner as the said firstly reserved rent:" Held, that the sum so covenanted to be paid was in the nature of an increased rent or liquidated damages, and not of a penalty; and that on the breach of the covenant, by conversion of a portion of the land into tillage, the jury was bound to find the increased rent, and were not at liberty to award arbitrary damages. *Smith v. Ryan*, 9 Ir. L. R. 235.

And see **COAL LEASE**.

CUSTOMARY TENEMENTS.—*Right to devise—What is proof of a custom to restrain it.*—A special case stated that lands

in a certain manor were held by customary tenure, passed by admittance, for the joint lives of the lord and tenant, were descendible from ancestor to heir, and, inter vivos, passed by deed of customary conveyance (licensed by the lord), with surrender and admittance. The case further stated that, before stat. 7 Will. 4 & 1 Vict. c. 26, there was no instance of a devise made by a customary tenant of the legal estate of any lands in the manor, but it had frequently occurred that a tenant, wishing to dispose of his customary estate after death, conveyed by deed of customary conveyance, and surrendered to a trustee as on ordinary alienation, the trusts of the equitable estate being then declared by a separate instrument, and being usually for the alienor during his life, and, after his death, to convey to such a person as he should by deed or will appoint; but there was no instance of a devise of any customary tenement in the manor without such previous conveyance, surrender, and declaration of trust: Held, that, on this statement, the tenements must be considered as estates descendible from ancestor to heir, subject to the ordinary rules governing a copyhold estate; that a custom not to pass estates by devise, or to pass them by some substituted method, was not shown clearly enough to supersede the ordinary right of a copyholder to devise his lands; and therefore that a devise of such lands without surrender to the use of the will (before stat. 7 Will. 4 & 1 Vict. c. 26,) was sustained by sect. 1 of stat. 55 Geo. 3, c. 192, and not excluded from its operation by the latter clause of sect. 3. *Doe d. Danil v. Thompson*, 7 Q. B. 897.

DAMAGES. See **PAYMENT**, 1.

DEBTOR AND CREDITOR. See **COGNOVIT**. **FRAUDULENT CONVEYANCE.** **PLEADING**, 5. **PRINCIPAL AND SURETY.**

DE INJURIA. See **PLEADING**, 2, 11, 12.

DEMURRER.—*Joinder in*—*Reg. Gen. Hil. T. 4 Will. 4, r. 3; Reg. Gen. Hil. T. 2 Will. 4, r. 108.*—A defendant who obtained time to plead on the term of rejoining within twenty-four hours, delivered several pleas, to some of which the plaintiff replied, concluding to the country, and to others he demurred. The plaintiff having added the similiter and joinders in demurrer, the defendant struck them out. The plaintiff then obtained a judge's order, "that the defendant forthwith join in demurrer." On motion to rescind that order: Held, that the *Reg. Gen. Hil. T. 4 Will. 4, r. 3*, qualified and altered the *Reg. Gen. Hil. T. 2 Will. 4, r. 108*, and that the plaintiff was irregular in adding the joinders in demurrer. *Cook v. Blake*, 4 D. & L. 313.

And see **DISCONTINUANCE.** **PRACTICE**, 5, 6.

DEPARTURE. See **HUSBAND AND WIFE**, 2. **PLEADING**, 10.

DEPOSIT. See **VENDOR AND PURCHASER**.

DETINUE.—*Pleading.*—Declaration alleged that plaintiff delivered certain paper writings, purporting to be scrip certificates for shares, to defendant, to be redelivered on request, after payment to him of a certain sum, averring that that was paid to defend-

ant. Breach, that defendant hath not delivered the paper writings, though requested, but detains the same. Plea, that they were deposited with defendant as a pledge and security for 210*l.* advanced by him to plaintiff, and that on payment of that sum defendant had offered to deliver up and return them to plaintiff, who then refused to receive them: Held, on demurrer, that this plea was bad, for denying the detention argumentatively, and for amounting to non detinet. The detention complained of was an adverse detention, because the word detain, in a declaration in detinue, means that defendant withholds the goods, and prevents plaintiff from having possession of them. The bailment stated in the declaration in detinue, whether it be general or special, is surplusage, and not traversable, the gist of the action being the detainer of plaintiff's goods. *Clements v. Flight*, 16 M. & W. 42; 4 D. & L. 261.

DEVISE. See CUSTOMARY TENEMENTS.

DISCONTINUANCE. — *Costs—Practices.*—After judgment for defendant on demurrer to one of several counts, the plaintiff took out a side bar rule to discontinue the action generally (see Reg. Gen. Hil. 2 Will. 4, art. 106). The defendant's costs, not of the demurrer only, under 3 & 4 Will. 4, c. 42, s. 34, but of the whole action, were taxed on the rule to discontinue, treating that rule as the termination of the action, and were received by defendant's attorneys as defendant's costs on discontinuance of the action. Judgment was entered upon the record for the defendant on the first count only: Held, that the discontinuance being issued after judgment, without leave of the court, was irregular, and that the judgment was also irregular. The judgment was set aside without costs. *Benton v. Polkinghorne*, 16 M. & W. 8.

And see PLEADING, 8.

DISTILLER. See EXCISE, 1.

DISTRESS. See PLEADING, 11.

DUBLIN CITY MARSHAL. See TRESPASS, 1.

DUPLICITY IN PLEADING. See HUSBAND AND WIFE, 2.

EJECTMENT.—1. *Defence.*—In ejectment for nonpayment of rent, a defendant cannot be compelled to confine his defence to the part of the lands in his actual possession. *Pover v. Connellan*, 9 Ir. L. R. 266.

2. *Joint demise by two of three executors.*—Two of three co-executors may recover lands of their testator in ejectment, on a joint demise. *Doe d. Stace v. Wheeler*, 15 M. & W. 623.

3. *Service—Secretary of railway company.*—Personal service of a declaration in ejectment on the secretary of a railway company, who are in possession of the land sought to be recovered, is, under the 8 & 9 Vict. c. 16, s. 135, sufficient for a rule absolute for judgment against the casual ejector. *Doe d. Bayes or Burgess v. Roe*, 16 M. & W. 98; 4 D. & L. 311.

And see COSTS, 4. LANDLORD AND TENANT, 3.

ENROLMENT. See ANNUITY.

ERRONEOUS JUDGMENT. See EXECUTOR AND ADMINISTRATOR, 1.

EVICITION. See LANDLORD AND TENANT, 1, 8.

EVIDENCE.—1. *Admissions by recitals in a deed.*—A., by a deed in which it was recited that he was seised in fee, mortgaged to B. in fee. Indorsed on this deed was a memorandum, signed by C., that, “by an indenture of surcharge, bearing date, &c. the within premises were charged by me, the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.* and interest :” Held, that this amounted to an admission by C. that he came in under A., and that he was therefore bound by the recital of A. *Doe d. Gaisford v. Stone*, 3 C. B. 176.

2. *Evidence of postmark.*—*Seemle*, if the postmark of a letter be given in evidence, it ought to be proved either by persons from the post office, or by persons who are in the habit of receiving letters from that post office. *Woodcock v. Houldsworth*, 16 M. & W. 124.

3. *Proof of having sent letter by post.*—To prove the sending of a letter by plaintiff to defendant, a clerk of plaintiff deposed that he made up the letters of which this was one, and placed them in a box in the room where he sat, and that the public postman invariably called every day and took the letters from that box : Held, that such delivery to the postman was evidence for the jury that the letters had gone to the post office. *Skilbeck v. Garbett*, 7 Q. B. 846.

4. *Undertaking to give material evidence, how satisfied.*—A letter written and posted in county A., and addressed to and received by the plaintiff in county B., whereby the defendant admits a part of the debt claimed in the action, is evidence sufficient to satisfy the plaintiff’s undertaking to give material evidence in county A. *Hall v. Story*, 16 M. & W. 63; 4 D. & L. 345.

And see CONTRACT, 1.

EXCEPTION. See PLEADING, 9.

EXCHEQUER.—*Equity jurisdiction of, in matters of revenue.*—The equity jurisdiction of the Court of Exchequer as a Court of Review is not taken away by the statute 5 Vict. c. 5. *Att.-Gen. v. Halling*, 15 M. & W. 687.

EXCISE.—1. *Distiller of spirits, who is.*—A person who distils spirit for the purpose of making, by the addition of nitric acid, sweet spirits of nitre for sale, is a distiller of spirits within the meaning of the 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise license, and liable to the penalties imposed by sect. 39 of that act on persons having any private or concealed still, &c., for making or distilling low wines or spirits. *Att.-Gen. v. Bailey*, 16 M. & W. 74.

2. *Spirit license.*—The 7th sect. of the 3 & 4 Will. 4, c. 68, applies to the case of a person who has been previously licensed as well as to the case of a person applying for a license for the first time, and therefore it is necessary that a party applying for and obtaining a

license should enter into the bond required by the 7th section, even though he should have obtained a license, and entered into a similar bond in the preceding year. *M'Garry v. Pape*, 9 Ir. L. R. 141.

EXECUTION. See BANKRUPT, 1. PROCESS, 2.

EXECUTOR AND ADMINISTRATOR.—1. *Ne unques administrator*—How such plea should conclude—*Erroneous judgment below rectified by court of error*.—In an action against an administrator, the plea that defendant is not nor ever hath been administrator &c. properly concludes with a verification, being undistinguishable in this respect from the like plea by an executor. So held by the Court of Queen's Bench on special demurrer, and by the Court of Exchequer Chamber on error from the Queen's Bench. The Court of Queen's Bench gave a judgment for the defendant, which the Court of Error upheld; but the judgment in B. R. was entered up erroneously, that the writ be quashed. The Court of Error reversed that judgment, and gave judgment that the plaintiff take nothing by his writ and that the defendant go thereof without day. *Scott v. Wedlake*, 7 Q. B. 766.

2. *Pleading—Use and occupation*.—To a declaration in indebitatus assumpsit against an administratrix containing counts for use and occupation and the money counts, the defendant pleaded to the whole declaration, that before she had any notice of the said demands and before she had any notice of the making of the said promises she had fully administered: Held bad, as tendering an immaterial issue, and as surplusage; held also, that surplusage, tending to embarrass the pleading, is ground of special demurrer. *Quare*, would such a plea to the count for use and occupation be a good plea? *Commissioners of Education v. Longham*, 9 Ir. L. R. 167.

And see EJECTMENT, 2. MONEY HAD AND RECEIVED.

EXTORTION. See SHERIFF, 2.

FEME COVERT.—*Conveyance by, under 3 & 4 Will. 4, c. 74, s. 91*.—Upon a motion, on the part of a married woman, under the 3 & 4 Will. 4, c. 74, s. 91, to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is lunatic at the time of the application. *Re Turner*, 3 C. B. 166.

FILING. See COGNOVIT, 3.

FOREIGNER. See PATENT, 1, 2, 3.

FOREIGN JUDGMENT.—*Plea, that the defendant had no notice of process in the foreign court, and did not appear to defend therein*.—In assumpsit on a judgment or decree of the Tribunal of Commerce at Brussels, the defendant pleaded that he was not at any time served with any process issuing out of the court at the suit of the plaintiffs for the causes of action upon which the said judgment or decree was obtained, nor had he at any time notice of any such process, nor did he appear in the said court to answer the plaintiffs:

Held bad, inasmuch as the plea did not show that the proceedings against the defendant in the Belgian court were so conducted as to deprive the defendant of the opportunity of defending himself therein. *Reynolds v. Fenton*, 3 C. B. 187.

FOREIGN LAW. See PLEADING, 2.

FORMA PAUPERIS. See RELEASE, 1.

FORMER RECOVERY. See TROVER.

FRAUDS, STATUTE OF.—*Acceptance of goods*.—Goods were shipped by the plaintiff from abroad to this country on the verbal order of the defendant at a price exceeding 10*l.*; they were sent to a shipping agent of the plaintiff in London, who received them, and warehoused them with a wharfinger, informing the defendant of their arrival; the wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement on payment of rent and charges; the agent indorsed and delivered this warrant to the defendant, who kept it for several months, and, notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods, and that they would remain for the present in bond: Held, that there was no such delivery to or acceptance by the defendant of the goods as to satisfy the 17th section of the statute of frauds. *Farina v. Home*, 16 M. & W. 119.

FRAUDULENT CONVEYANCE.—*What is*.—A sale of property for good consideration is not, either at common law or under stat. 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. *Wood v. Dixie*, 7 Q. B. 892.

FRIVOLOUS DEMURRER. See PRACTICE, 6.

GENERAL ISSUE. See PLEADING, 3.

GUARANTEE.—1. *Consideration*.—Held, that no consideration appeared on the face of the following guarantee: "1843, June 28. Mr. Price, I will see you paid for 5*l.* or 10*l.* worth of leather on the 6th of December, for Thomas Lewis, shoemaker." *Price v. Richardson*, 15 M. & W. 539.

2. *Construction of—Liability of guarantor for due payment of bill of exchange—Interest—Variance*.—Declaration in assumpsit on a guarantee stated that the defendant promised the plaintiffs to guarantee to them the due acceptance and payment of two bills of exchange, drawn by K. being the amount of an invoice of the plaintiffs of goods shipped by them, and that as the defendant had not then heard from K. if the invoice had been found correct, the defendant was to have "the reserve customary under such circumstances." The terms of the guarantee were, that the defendants guaranteed the due acceptance and payment of the bills, &c., and it proceeded thus, "As we have not heard from Mr. K., if your invoice has been found correct, we claim *this reserve* as customary under

such circumstances;" it appeared that the invoice was in fact correct: Held, that there was no variance. A party who guarantees the due payment of a bill of exchange by the acceptor is liable for interest upon it if it be not paid when due. *Ackermann v. Ehrensperger*, 16 M. & W. 99.

HABEAS CORPUS. See **SMALL DEBTS ACT.**

HUSBAND AND WIFE. — 1. *Coverture* — *Circumstances and informal plea of.* — To a count against the maker of a promissory note, he pleaded in bar, that at the time of making the note the plaintiff was the wife of A.; that the consideration for the note was the loan of money of A. advanced by the plaintiff to the defendant without A.'s authority, and against his will; that the plaintiff took the note, and held and still holds the same without the authority and against the will of A., and that he never had any property in or right to the note: Held, an informal plea of coverture. *Guyard v. Sutton*, 3 C. B. 153.

2. *Pleading* — *Duplicity* — *Departure* — *Reduction of wife's chattels into possession by husband during coverture* — *Action by wife as survivor* — *Statute of Limitations.* — In assumpsit by payee against maker of a promissory note, defendant pleaded, that when the note was made plaintiff was the wife of B., and that after the making, and while plaintiff was the wife of B., he "elected to take and have the said note in his marital right, and then caused the plaintiff to indorse, and she, by his authority, did indorse the note, and B. then delivered it, so indorsed, to F.; and that afterwards, and after the note became due, and before action brought, B. died; and that afterwards, and before action brought, the note came to plaintiff's possession by delivery from F. *Quære*, supposing that the words "elected to take," &c., and "caused the plaintiff to indorse," &c. contained averments of two distinct acts, whether the plea was not bad for duplicity; but, assuming that the whole merely stated one transaction: Held, on special demurrer, that the plea was bad, because it did not clearly show such a reduction of the note into possession by the husband as disentitled the wife to sue upon it after his death. Defendant also pleaded the Statute of Limitations. Replication, that when the cause of action accrued, plaintiff was the wife of B., and that she continued to be so until, &c. when B. died, and plaintiff became discover; and that she sued within six years after the death: Held, a good replication. Rejoinder, that the plaintiff was a feme covert, and the wife of B. until the time of his death, as in the replication mentioned; that the note was payable to her order; and that, before it was due, B. authorized her to indorse it in blank in her own name, and deliver it to F., which she did, for value; that when the note became due, and more than six years before action brought, the note was in the hands of another indorsee, who presented it for payment; and that afterwards, and before action brought, the note came to the possession of plaintiff by delivery from the last-mentioned indorsee, who was then entitled to sue thereon: Held, on special demurrer, that the rejoinder

was bad, for, either the matter alleged was a departure after pleading the Statute of Limitations, which plea admitted an original right of action, or if the rejoinder was confined to the matter stated in the replication, it was no answer, for want of a denial that the action was brought within six years after the husband's death. *Scarpellini v. Atcheson*, 7 Q. B. 864.

And see LIBEL AND SLANDER, 5.

INTEREST.—*On judgment debt, from what time it runs.*—Interest runs on a judgment debt under the stat. 1 & 2 Vict. c. 110, s. 17, from the time of the entry of the incipitur, and not merely from the final completion of the judgment after the taxation of costs. *Newton v. The Grand Junction Railway Company*, 16 M. & W. 139.

And see GUARANTEE, 2.

INTERPLEADER. See SHERIFF, 3.

IRREGULARITY. See PRACTICE.

JOINDER. See DEMURRER.

JOINT STOCK BANK.—*How far affected by notice to one of its members.*—A., B., C., and D., who carried on business under the firm of G., P. & Co., in 1840 opened an account with a banking company, established under the 7 Geo. 4, c. 46, 1 & 2 Vict. c. 96, and 5 & 6 Vict. c. 85. In 1842, A. retired from the firm, but this fact was not advertised in the London Gazette, nor was any alteration made in the pass book: Held, that the mere fact of D., one of the firm of G., P. & Co., being also a director of the banking company, (but having as such no share in the management of or interference in the banking accounts,) did not amount to notice, actual or constructive, to the bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a banking company so established differing in this respect from an ordinary trading partnership. *Pomles v. Page*, 3 C. B. 16.

JUDGMENT. See CHARGING ORDER. DISCONTINUANCE. PRACTICE, 1, 6, 10, 13. USURY. VARIANCE.

JUDGMENT AS IN CASE OF NONSUIT.—*Where cause struck out.*—A defendant is entitled to move for judgment as in case of nonsuit, although the cause, on being called on for trial, was struck out of the list in consequence of neither plaintiff nor defendant appearing. *Allott v. Bearcroft*, 4 D. & L. 327.

JUDGMENT DEBT. See INTEREST.

JUDGE'S ORDER. See ARREST. PRACTICE, 7, 14.

JURAT. See AFFIDAVIT, 4.

JUROR.—*Town councillor—Challenge.*—A town councillor of the borough of Dublin is exempt and disqualified from serving on a special jury summoned within the borough: and one of the special jurors having been challenged at the trial, on the ground of being a member of the town council for the time being of the borough of

Dublin, the opposite party put in a counterplea, alleging that the jury was a special jury, "and that at the time of the striking of the jury aforesaid, and the arranging of the said panel, the said juror was a town councillor of the borough of Dublin, and that the same was well known to the said defendant at the time of the striking of the said jury, and arranging of said panel:" Held, that the challenge was a good challenge, and that the counterplea was not a sufficient answer to it. *Dissentiente Richards, B. O'Connell v. Mansfield*, 9 Ir. L. R. 179.

LANDLORD AND TENANT.—1. *Eviction.*—Covenant for rent on a lease. Plea, that before the lease was made, one P. impleaded the plaintiffs, and had judgment of elegit against their lands &c.; that the inquisition found plaintiffs seized of the demised premises then leased to B., subject to two mortgages for years; that the sheriff delivered the demised premises to P., to hold &c. till his damages and costs should be levied thereout; that before the rent became due, defendant was evicted by P., who entered and then ejected, expelled, put out, and removed defendant therefrom, and kept and continued him so ejected, &c.; that 1000*l.* was still due to P., which was not levied. Replication traversed the eviction in the words of the plea. At the trial, the lease, elegit, and inquisition were put in, and it was proved that P. had called on defendant to pay him rent, or he, P., would turn him out, on which defendant attorned to him without privity of the plaintiffs, his lessors: Held, that the plaintiffs were entitled to recover, as P.'s elegit only entitled him to the reversion expectant on the mortgages by the lessors: Held also, that the expulsion as pleaded was not established by the evidence. *The Mayor, &c. of Poole v. Whitt*, 15 M. & W. 571.

2. *Same.*—*Semble*, that if a party, having a paramount right to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, and attorns to the claimant accordingly, that would be equivalent to an expulsion. *S. C. ib.*

3. *Forfeiture of lease—Ejectment*—1 Geo. 4, c. 87.—The statute 1 Geo. 4, c. 87, s. 1, enabling landlords to recover premises unlawfully held over by tenants, does not apply to the case where the tenant holds under a lease, which has not expired by lapse of time, but a right of re-entry is claimed for non-performance of the covenants. *Doe d. Cundey v. Sharpley*, 15 M. & W. 558.

4. *Inclosure by lessee for benefit of lessor.*—Lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near but not actually contiguous to the farm. The lessor was not lord of the waste: Held, that in the absence of evidence showing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease: Held also, that such presumption was not rebutted by the fact that the lessee during the lease made a conveyance of these

inclosures to his son in fee, which, however, was not delivered nor followed by any possession. *Doe d. Lloyd v. Jones*, 15 M. & W. 580.

5. *Same*.—By writing indorsed on the lease, the lessee agreed that all inclosures made by him on the said waste should be surrendered up to the lessor, his heirs, &c. at the end of the lease, and that the lessee should pay to the lessor, his heirs, &c. the sum of 6d. annually, as an acknowledgment for the same: Held, that this was an admission on the part of the lessee that he had made the inclosures for the benefit of the lessor. *S. C. ib.*

6. *Lease or agreement—Stamp—Notice to quit*.—By a memorandum of agreement, dated 23rd of June, 1842, made between A., as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, it was agreed (provided a license could be obtained from the lord of the manor, and upon B. putting the premises into repair,) that the churchwardens should grant a lease to B. for twenty-one years from Midsummer day then next, under the clear yearly rent of 30l.; such lease to contain covenants for payment of rent and taxes, and to repair and insure, not to commit waste, &c., and all other usual and proper covenants, &c., and B. agreed to accept such lease, and execute a counterpart, &c., and that, until such lease and counterpart should be granted, the said yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed: Held, that this instrument was properly stamped as an agreement: Held, also, that the tenancy thereby created, whether a tenancy from year to year (which the court thought it was,) or a tenancy at will, was properly put an end to by a notice to quit and deliver up possession, given by persons acting as agents for C. and D., who were churchwardens at the time the agreement was made, and B. let into possession, notwithstanding the notice purported also to have been given on behalf of the churchwardens and overseers in office when the notice was served, and did not state to whom the possession was to be delivered up. *Doe d. Bailey v. Foster*, 3 C. B. 215.

7. *Lease or agreement—Determination of yearly tenancy by contract for purchase*.—On the 28th October, 1843, the plaintiff and defendant and M. entered into an agreement, by which, after reciting that M. was tenant to defendant of a house at a rent of 25l. a year, and had agreed to let it to plaintiff at a rent of 20l. a year from 24th June, 1844, at which time defendant agreed to exonerate M. from his tenancy on his paying all rent up to that day, and to accept plaintiff as tenant from that period at the said rent of 20l. a year, M. agreed to let and plaintiff to take the house from the date of the agreement to the 24th June then next, at the rent of 20l. a year; and M. agreed to find all materials except lath to put up a partition wall, &c. plaintiff finding lath and labour. And plaintiff agreed to take the house of defendant from the 24th June, at the rent of 20l. a year, and to give or take six months' notice to quit the premises; and defendant

agreed to exonerate M. from his tenancy on the said 24th June, as his paying up all rent due to that time. Immediately after the execution of this agreement, M. let plaintiff into possession of the premises. On 4th March, 1844, defendant agreed to sell the house to the plaintiff, but this agreement was not carried into effect: Held, first, that the instrument of 28th October, 1843, amounted to a lease of the premises by defendant to plaintiff from 24th June, 1844: 2ndly, that it was not affected by the subsequent agreement for the sale of the premises. *Tarte v. Darby*, 15 M. & W. 601.

8. *Quiet enjoyment—Contract for, where implied.*—In 1841, B. agreed to let to A. for eight years and a quarter certain premises subject to the same conditions as were mentioned in the memorandum under which B. held of C.; and it was further agreed that if C. was willing to accept A. as tenant instead of B., A. was willing to take the remainder of the lease or memorandum from C., and become his tenant. It appeared that C. was tenant to D., and that C.'s term expiring at Christmas, 1844, D. brought ejectment, and turned A. out on the 7th of February, 1845. In an action by A. against B. for this eviction, the declaration, after setting out the agreement and mutual promises, alleged that B. undertook and promised A. that he should and might quietly use, occupy and enjoy the premises for the term for which B. had so agreed to let them as aforesaid: Held, that no such promise could be implied from the contract set out in the declaration, the contract being subject to conditions, the nature of which were not disclosed. *Quære*, whether a contract for quiet enjoyment can be implied by law from a mere agreement to let. *Messent v. Reynolds*, 3 C. B. 194.

LAPSE OF TIME. See LIMITATION.

LEGACY. See MONEY HAD AND RECEIVED.

LIBEL AND SLANDER.—1. *Construction of libel*—What amounts to a charge of conspiracy.—A libel, which, by the innuendo to the heading of it, was alleged to be conversant about a false charge of felony, made through feeling of religious bigotry by the plaintiff against one D. S., went on to allege that "the plaintiff was aided in making the said charge by one C. R., who was stated to have been for some time back employing every means to win the confidence of this young gentleman, their intended victim, (meaning thereby that the said plaintiff and the said C. R. had been contriving some plan to assail the character and destroy the reputation of the said D. S.), as taking him on country visits, and inviting him to the continent, with the hope, it is alleged, of getting him altogether to themselves, and destroying his prospects the more easily by some foul charge, which he could not find means of contradicting, there being no one else in company. They had met with a direct refusal, it seems, to their invitation to the continent, and therefore rather prematurely opened their present plot (meaning the said charge of felony); affidavits are, we understand, shortly to be laid before the law officers of the crown, charging the above facts, together with certain conversations between

the pair of Romanists who have trained this ingenious manœuvre, (meaning the charge of felony aforesaid):" Held, that the said libel did not amount to a charge of conspiracy, though in the introductory part of the declaration the plaintiff alleged that the object of the defendant was to injure him, &c. by causing it to be suspected and believed that he the said plaintiff was guilty of conspiracy, calumny and fabrication of false charges, and that therefore it was not necessary that the defendant should have justified such a charge. *O'Connell v. Mansfield*, 9 Ir. L. R. 179.

2. *Libel—Plea of justification—Demurrer—Want of particularity.*—Declaration for a libel, which stated that the plaintiff sought admission into a club, and gave an entertainment a few days before he was to be elected; that on the next morning he bolted, and that some of the poor tradesmen had to lament the fashionable character of his entertainment. Plea, that the plaintiff did suddenly leave and quit the town without paying debts contracted by him with divers persons in the town, with intent to defraud and delay them, whereby the said persons remained unpaid: Held bad, for not stating the names of the persons alleged to have been defrauded.—*O'Brien v. Clement*, 4 D. & L. 343.

3. *Libel—Plea of justification—Insufficiency of demurrer.*—A declaration for a libel, which stated that the plaintiff sought admission into a club, and gave a crack entertainment a few days before he was to be elected; that he was afterwards blackballed; and that on the next morning he bolted; and that some of the tradesmen had to lament the fashionable character of his entertainment. Plea, that the plaintiff suddenly left and quitted the town, leaving divers tradesmen to whom he owed money unpaid: Held, that the plea was bad, inasmuch as the libel imputed a fraudulent evasion of creditors, and the plea only stated something which was not necessarily fraudulent, and was not averred to be so. *O'Brien v. Bryant*, 4 D. & L. 341.

4. *Slander—Averment by way of recital.*—Case. Declaration stated for that whereas the defendant contriving and wickedly intending to injure the plaintiff spoke and published the false, malicious and defamatory words following, (stating the words and averring special damage to the plaintiff in his business): Held bad on special demurrer, for charging the grievances to have been committed by the defendant by way of recital only, and not directly or positively. *Brown v. Thurlow*, 16 M. & W. 36; 4 D. & L. 301.

5. *Slander—Action by husband and wife—Plea in abatement.*—To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff is a good plea in bar. *Chantler v. Lindsey*, 16 M. & W. 82; 4 D. & L. 339.

6. *Slander—Action by one of several partners—Plea in abatement—Damage sustained jointly by plaintiff and partners.*—Declaration stated that plaintiff was a banker in partnership with A. and B., and that defendant falsely and maliciously spoke words of plaintiff, and of him in his said trade, imputing to him insolvency, by means

whereof plaintiff was injured in his good name, and divers persons believed him to be indigent and refused to deal with him in his said trade, and one C. withdrew his account from the bank of plaintiff and his partners. Plea in abatement: that plaintiff carried on the said business jointly and undividedly with A. and B., and not otherwise, and that all the damage in declaration mentioned accrued to A. and B. jointly with plaintiff, and not to him alone; and that at the time of the commencement of the suit A. and B. were living, &c.: Held bad, because it was pleaded in terms to damage and not to the cause of action, and the special damage to the partnership was not so essentially the cause of action that without it the action could not have been maintained. *Quære*, whether the declaration would have been bad on special demurrer for blending a cause of action vested in the plaintiff simply with a cause common to the partners. *Robinson v. Marchant*, 7 Q. B. 918.

LICENSE. See **EXCISE**, 2.

LIEN.—*Of conveyancer on deeds.*—A certificated conveyancer has no lien for his charges upon deeds delivered to him, with and in respect of which he does certain business for the owner of the deeds. *Steadman v. Hockley*, 15 M. & W. 553.

LIMITATION.—1. *Of action—What is a thing done in pursuance of an act within meaning of limitation clause—From what time limitation runs.*—A railway company was empowered by statute to divert a canal, and it was enacted that, if by any accident, or in the execution of any works authorized by the act, (otherwise than from the neglect or mismanagement of the canal company,) or by reason of the bad state of repair of the railway company's works, the canal should be so obstructed that boats could not pass, the railway company should pay the canal company, by way of ascertained damages, 10s. at least for every hour during which the obstruction should continue; and if it should continue beyond seventy-two consecutive hours, or should have been occasioned by any wilful act of the railway company, then at 20s. per hour at least by way of ascertained damages; and that in default of payment on demand made on the railway company's treasurer, &c., the canal company might recover the sum by action of debt or on the case; but this clause was not to prevent their recovering special damage in respect of injuries by machines or engines on the railway, or of the acts or defaults of the railway company, in respect of which the lowest amount of liquidated damages was ascertained as aforesaid, though the special damage might exceed the liquidated damages; but if such liquidated damages should have been paid, and any action for special damage should be brought, credit was to be given therein for such payment. It was also enacted, that no action should be brought for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities given by it, without twenty days' notice, nor unless the action should be brought within six calendar months next after the act committed; or in case there should be a

continuation of damage, then within six calendar months next after the doing of such damage should have ceased: 1. Held, that an action of debt for liquidated damages incurred by obstructing the canal was an action for something done in pursuance of the act, and that the limitation clause applied. 2. The declaration stating that the canal, by means of the defendant's works, became obstructed on a certain day, and continued so obstructed for ninety-nine hours next following, and that the defendants refused payment when demanded: Held, that the time of limitation ran from the last obstruction and not from the demand of payment. *Kennet and Avon Canal Company v. The Great Western Railway Company*, 7 Q. B. 824.

2. *Statutes of limitation*, 21 Jac. 1, c. 16, s. 7, and 4 Anne, c. 16, s. 19, *operation of, where one of several partners was beyond sea—Averments in pleading as to lapse of time—Incorporation of plea with declaration.*—Declaration in assumpsit, reciting a writ issued on the 28th of November, 1843, charged that heretofore, to wit, on the 29th day of December, A. D. 1830, defendant contracted that he would, within twelve months from a certain day, to wit, the day and year aforesaid, supply plaintiff with certain articles. Breach: that defendant did not nor would, within twelve months from the said day, to wit, the day and year aforesaid, supply the articles. Plea: that the cause of action did not accrue within six years next before the commencement of the suit. Replication: that defendant when the action accrued was beyond seas, and that the action was commenced within six years of his return after such accruing. Rejoinder: that the promise was made by defendant jointly with W., that after the accruing of the action, and more than six years before the commencement of the suit, W. was in the kingdom and might have been sued. On demurrer to the rejoinder, Held, 1, that the declaration was substantially good, the averments showing that twelve months had elapsed before the action; and further, that the plea might be resorted to as showing that the twelve months had so elapsed. 2. That the rejoinder was no answer to the replication; for that under stat. 4 Anne, c. 16, s. 19, if a right of action accrue against several persons, one of whom is beyond seas, the Statute of Limitations does not run till his return, though the others have never been absent from the kingdom. *Fannin v. Anderson*, 7 Q. B. 810.

3. *Statute of Limitations*, 3 & 4 Will. 4, c. 27.—Trespass q. c. f. Plea deducing title by an inclosure act to an allotment of land, comprising the locus in quo, to one T., and stated his entry and possession until just before the time when, &c., and giving colour to the plaintiff, justified the trespass as the servants of and by the command of T. Replication, that defendants entered and committed the trespasses after the passing of the Limitation Act, (3 & 4 Will. 4, c. 27,) and that the entry was made for the purpose of recovering the close in which, &c., and that the right to enter did not first accrue to T. or the defendants, or any person through whom they claimed, at any time within twenty years before making that entry: Held, on special demurrer, that the replication was good, it being sufficient for the

plaintiff to bring the case within the second section of the statute; and if the defendants relied upon any subsequent clause as preventing the right of entry from being barred, that matter should come from them by way of rejoinder. *Jones v. Jones*, 4 D. & L. 494.

And see HUSBAND AND WIFE, 2. TITHES, 1.

MALICIOUS ARREST.—1. *Declaration—Averment of falsehood or fraud in obtaining judge's order for capias—Defect cured by verdict.*—Since the 1 & 2 Vict. c. 100, the declaration in an action for a malicious arrest must allege falsehood or fraud in obtaining the judge's order for the capias, and must state the circumstances which constitute such falsehood or fraud. But where the declaration alleged that the defendants, not having reasonable or probable cause for believing that the plaintiff was about to quit England, falsely and maliciously, and without reasonable or probable cause, caused and procured a judge to make an order for the plaintiff's arrest: Held, that after verdict the declaration must be taken to mean that the order was procured by false evidence or by means of falsehood, the allegations as to the defendants not having reasonable or probable cause for believing that the plaintiff was about to quit England being rejected as surplusage. *Daniels v. Fielding*, 4 D. & L. 329.

2. *Want of probable cause—Suppressio veri in affidavit to hold to bail—New trial—Misdirection.*—In case for maliciously and without reasonable or probable cause causing the plaintiff to be arrested on a capias under the statute 1 & 2 Vict. c. 110, s. 3, the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract, for the alleged breach of which the defendants were suing; the judge having stated that in his opinion the plaintiff had failed to make out a want of reasonable and probable cause, told the jury that to entitle the plaintiff to a verdict they must be satisfied that there was a total want of reasonable and probable cause, and that the defendants had acted with malice: Held a misdirection. *Gibbons v. Alison*, 3 C. B. 181.

MANDAMUS. See MUNICIPAL CORPORATION.

MANOR. See COPYHOLDS. CUSTOMARY TENEMENTS.

MASTER AND SERVANT.—*Agreement in restraint of trade.*—The plaintiffs agreed in writing with L. that he should serve them for seven years as a crown glass maker; that he should not during that term work for any other person without their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages; that the plaintiffs should pay him so long as he should be employed and work as a crown glass maker certain wages by the piece, and 8*l.* a year in lieu of house rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages: Held, that this agreement bound the plaintiffs to employ L. during

the seven years, subject to the above power of dismissal; that there was therefore a good consideration for L.'s contract to serve for the seven years, and the agreement was not an unlawful restraint of trade. *Pilkington v. Scott*, 15 M. & W. 657.

MIDDLESEX COURT OF REQUESTS.—*Suggestion—Affidavit.*—An affidavit in support of an application to enter a suggestion under the 23 Geo. 2, c. 33, (the Middlesex Court of Requests Act) described the defendant as of No. 51, Bedford Row, Holborn, in the county of Middlesex, and further stated that before and at the commencement of this suit he was, and ever since hath been and still is, inhabitant and resident in Bedford Row aforesaid, and that for and during all that time he was and still is liable to be summoned to the Court of Requests at Kingsgate Street, Holborn, aforesaid, and that the cause of the above action, and every part thereof, arose within the jurisdiction of the said court: Held, that the affidavit was insufficient, as it did not show the whole of Bedford Row to be in the county of Middlesex; and that the court could not take judicial notice that the Court of Requests for Middlesex was held in Kingsgate Street. *Thorne v. Jackson*, 4 D. & L. 478.

MONEY HAD AND RECEIVED.—*Legacy—Priority of Contract.*—The defendant, as the agent of an executor, wrote to a legatee informing him of his legacy and its amount, stating that he would remit it in any way the legatee might suggest. He transacted the business necessary for the transfer of the legacy, and remitted to the legatee the amount of the legacy, minus a sum deducted for expenses: Held, that the defendant was not liable to legatee in an action for money had and received for the sum so deducted. *Barlow v. Browne*, 16 M. & W. 126.

MONEY PAID. See PRINCIPAL AND SURETY.

MORTGAGE. See ASSIGNMENT.

MUNICIPAL CORPORATION.—1. *Borough rate—When not legally made.*—The council of a borough made a borough rate to levy 659l., and assessed a portion of that sum on the parish of W. within the borough. The rate ordered was 6d. in the pound, on the value of messuages, &c., and the council appointed overseers to levy it in W. The overseers, in consideration of circumstances peculiar to W., made and assessed the rate on that parish at 7d. in the pound. B., an inhabitant, refused payment, his name was in consequence left out of the burgess list, and the mayor and assessors refused to insert it in the burgess roll: Held, that the rate of 7d. was invalid; and the court awarded a mandamus to the mayor and assessors to enrol B.'s name. *Reg. v. The Mayor of New Windsor*, 7 Q. B. 906.

2. *Return to mandamus.—Separating good part of return from bad.*—The writ recited that B., a person duly qualified and entitled to be enrolled in the burgess roll of the said borough in respect of property within the said parish and borough, was omitted, &c. The return certified that B. was not a person duly qualified and entitled to be enrolled in the burgess roll of the said borough in respect of

property within the said parish, as in the writ mentioned; and it further certified the making and assessing of the rate as above stated, and B.'s refusal to pay, and that because of such refusal, and for other the causes aforesaid, B. was not qualified to be enrolled, &c.: Held, on demurrer, that the latter part of the return was bad, by reason of the objection to the rate; but that the former part might be separated from the latter, and was a sufficient answer to the rate. *S. C. ib.*

NEGATIVE PREGNANT. See PLEADING, 7.

NEW ASSIGNMENT. See PLEADING, 11.

NEW TRIAL.—Costs.—A rule was made absolute for a new trial, without any mention of costs in the rule: Held, that the master was right in allowing the successful party all such costs of first trial as were available for the second; and therefore that he was right in allowing the costs of the briefs, subpoenas and copies on the first trial, but not the fees on the briefs or the consultation fees, or the costs of serving the subpoenas for the first trial. *Lambert v. Lyddon*, 4 D. & L. 400.

And see PRACTICE, 13.

NISI PRIUS.—Practice—Verdict.—A judge cannot receive a verdict upon some issues and discharge a jury on the remainder, if those issues be material. *Edge v. Wandesford*. 9 Ir. L. R. 161.

NOTICE. See JOINT STOCK BANK.

NOTICE OF ACTION. See COSTS, 7. TRESPASS, 1.

NOTICE OF DISHONOUR. See BILLS AND NOTES, 1, 3.

PARLIAMENTARY ELECTION. See CASE, 1, 2, 3.

PARTICULARS. See PRACTICE, 8, 9.

PARTNERS.—1. Authority—Entering appearance.—Where a partner had been taken in execution on a judgment signed on a warrant of attorney given by a co-partner without the authority of the former, and without his knowledge of the proceedings in the action, the court set aside the proceedings, and discharged the defendant, one partner not having authority to enter an appearance or submit to a judgment on behalf of the firm. *Hambridge v. De la Croude*, 4 D. & L. 466.

2. Liability of, quoad third parties—Dealing with the firm.—One who takes a share of the profits as such of a trading concern thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment. Yet the receipt of a per centage upon the gross amount of sales made to certain customers by the person who recommended such customers does not constitute him a partner as to third persons. A., who was concerned in a colliery, in the year 1830, built and stocked a general shop in its neighbourhood, for the purpose of supplying goods to the work people, placing B. there to conduct the business, A. receiving for his use seven per cent. upon

the amount of the gross sales made to the miners, and B. taking all the rest of the profits of the concern, from whatever source derived. A.'s name appeared over the shop door and in the excise licenses, and down to the year 1834 all the goods supplied to the shop were purchased and paid for by or in the name of A. In that year it was agreed between A. and B. that the latter should henceforward buy all goods that were required for the shop, and that the former should receive only five per cent. upon the amount of sales to the miners. After this new arrangement had been come to, B., who had several other shops, opened an account with a bank at Holywell, and on the failure of the bank in 1839, there was a balance due to the bankers on that account exceeding 2000*l*. There was no evidence to show that credit was in fact given to A. by the bank, or that they were aware that his name had been placed over the shop door, or that they supposed him to be a partner at the time the debt was contracted. In an action by the assignees of the bankers against A. and B. to recover the balance, the jury having negatived the existence of an actual partnership between A. and B., or that A. had with his own permission been held out as partner, the court refused to disturb the verdict. *Potts v. Eyton*, 3 C. B. 132.

And see JOINT STOCK BANK. LIBEL AND SLANDER, 6. LIMITATION, 2.

PATENT.—1. *Taken out in trust for a foreigner who has assigned his interest in the invention abroad.*—A patent granted to a British subject in his own name for an invention communicated to him by a foreigner, the subject of a state in amity with this country, is not void, although such patent be in truth taken out and held by the grantee in trust for such foreigner. In such case the grantee is the true and first inventor within the realm, within the statute 21 Jac. I. c. 3. *Beard v. Egerton*, 3 C. B. 97.

2. *Pleading—Argumentative denial that the grantor was the true and first inventor.*—In case for an alleged infringement of a patent so granted, the defendant pleaded that by an agreement made in France between the original inventor and the King of the French, the former, for the considerations therein mentioned, assigned the invention to the French government, and that by virtue of that agreement, and by the laws of France, the invention became vested in the King of the French in right of his crown, who thereby became entitled by the laws of France to vend and publish the invention as well in that country as in Great Britain and Ireland, and in any other country or place where he should think fit, without any license from the inventor; concluding, wherefore the said letters patent were and are void, &c.: Held, that the plea was bad in substance, inasmuch as it contained no denial of the allegation that the patentee was the true and first inventor within this realm, which is all that is necessary to sustain the validity of the letters patent in respect of the granting thereof: Held also, that the circumstance of the original inventor having, for a valuable consideration, parted with his interest in the discovery to a person in France, was no bar

to his right to take out a patent for the same invention in this country. *S. C. ib.*

3. *Pleading—Publication abroad.*—A further plea contained an additional allegation that the King of the French had openly published and made known the invention, and the manner of performing the same, to the people of France, for the use and benefit of that people, and of all other nations and people in the world, as a free gift and benefaction for the benefit of all mankind, without limitation or restriction, whereby, according to the laws of France, the defendants became and were entitled to use, exercise and vend the said invention in any country or place, at their freewill and pleasure, without the leave or license or hindrance of the original inventor, &c.: Held, that this plea afforded no answer to the action. *S. C. ib.*

4. *Specification—Sufficiency of title of.*—The title described the patent to be for a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura: Held, that this was sufficiently precise and certain. *S. C. ib.*

PAVING ACT. See PLEADING, 9.

PAYMENT.—1. *In satisfaction of the "causes of action"*—*Debt—Damages.*—In debt, a plea of payment of a sum of money in satisfaction of all the causes of action in the declaration mentioned, is an answer as well to the damages as to the debt. *Triston v. Barrington*, 16 M. & W. 61; 4 D. & L. 273.

2. *Into court—Costs.*—To debt for goods sold, money lent, &c., the defendant pleaded, except as to 15s. parcel, &c., never indebted: and as to the said sum of 15s. payment into court. The plaintiff joined issue on the first plea, and accepted the 15s. paid into court. The issue was tried and found for the defendant: Held, that the plaintiff was entitled to all the costs relating to the 15s. paid into court. *Harrison v. Watt*, 4 D. & L. 519.

3. *Into court—Informal commencement of plea.*—A plea of payment of money into court, with a commencement "that the plaintiff ought not to maintain his action" is bad on special demurrer, notwithstanding the plea concludes with a prayer of judgment if the plaintiff ought further to maintain his aforesaid action. *Rosling v. Mugeridge*, 4 D. & L. 298.

4. *Into court of a sum in satisfaction of a larger one—Bill of exchange.*—To a declaration containing a count on a bill of exchange for 261l. 13s. 2d., and also an indebitatus count for 30l., the defendant pleaded (amongst other pleas) as to 10l. 9s. 1d. parcel of the sum in the first count, and also as to 10l. 9s. 1d. parcel of the sum in the second count, payment into court of 10l. and no damages ultra: Held bad on special demurrer, as payment of a smaller sum is no satisfaction of a greater. *Semble*, that where there is a count on a bill of exchange, and also a count for the consideration, a plea of payment into court should state that the bill was given on account of the debt in the second count, and then plead payment into court of the amount of the bill and interest. *Tattersall v. Parkinson*, 4 D. & L. 522.

PENALTY OR LIQUIDATED DAMAGES. See COVENANT.

PEREMPTORY UNDERTAKING. See PRACTICE, 11.

PLEADING.—1. *Account stated.*—In indebitatus assumpsit for money due on account stated, it is not sufficient to plead that after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, defendant and plaintiff accounted together of and concerning the said causes of action and all other claims and demands then being between plaintiff and defendant, amounting to a large sum, to wit 1000*l.*; and that on such accounting a small sum, to wit 150*l.*, was then found to be due and owing from defendant to plaintiff, which defendant then promised plaintiff to pay, and afterwards, before commencement of the suit, paid to plaintiff, who accepted it in full satisfaction of the sum due to him from defendant; for such a plea does not show that, at the time of the second accounting relied on any cross demand by defendant against plaintiff existed, or that if it existed it had not been agreed to be given up by defendant in consideration of plaintiff's giving up some other demand of his on defendant, so as to make payment of the balance a satisfaction of the larger sum. *Smith v. Page*, 15 M. & W. 683.

2. *Argumentative and inferential statement of foreign law—Replication de injuriâ.*—To debt on bond the defendant pleaded that the bond was executed by him in France, where he was then domiciled; that it was not taken or passed by any public officer authorized by the laws of that kingdom, nor was it written throughout by the hand of the defendant; that, though the defendant signed the bond with his own hand, he did not write thereon with his proper hand the formula styled in the French tongue à bon or approuvé, bearing in words at length the sum secured, nor was the defendant at the time a merchant or tradesman, &c.; concluding that by reason of the premises the bond, by the laws of France, never was or is binding or obligatory on the defendant, but always was and is of no force, effect or validity: Held, that the plea was bad, as being a mere argumentative and inferential statement of the French law, which, being pleadable only as matter of fact, ought to have been distinctly and affirmatively alleged. *Quære*, whether supposing it to have been well pleaded, the whole of the allegations therein might have been put in issue by de injuriâ. *Benham v. Earl of Mornington*, 3 C. B. 133; 4 D. & L. 213.

3. *Assumpsit—Plea amounting to non assumpsit.*—Declaration upon an agreement, whereby it was contracted that the plaintiff should supply and the defendant receive certain bales of wool, and alleging as a breach the refusal of the defendant to receive; plea, that the wool contracted for was to be according to sample, but the wool tendered was inferior to the sample: Held, on special demurrer, that the plea was not bad, as amounting to non assumpsit. *Sievehing v. Dutton*, 4 D. & L. 197.

4. *Commencement of declaration.*—The rule Reg. Gen. M. T. Will. 4, r. 15, as to the commencements of declarations, is compulsory, and therefore a declaration not disclosing whether the plaintiff proceeds in person or by attorney is irregular. An application to set aside should be made at chambers, and not to the court, even at term time. *White v. Feltham*, 4 D. & L. 454.

5. *Debt on bond—Argumentative plea—Insufficient averment.*—Debt on bond against a surety, under 1 & 2 Vict. c. 110, s. 8, conditioned for the payment of a debt due by H. or for his render. Plea, that the plaintiff recovered judgment in the Queen's Bench for the debt, and arrested and detained H. on a ca. sa.; that H. sued out a habeas corpus cum causâ, and was committed to the Marshalsea of the Queen's Bench, and detained there until after the return day of the writ; that H. was always ready to render himself, and would have rendered himself according to the practice of the court, but that he was prevented from so doing by the plaintiff in manner aforesaid: Held, on special demurrer, that if the plea was construed as an excuse, as it did not distinctly aver that it was impossible for H. to render himself, it was bad as argumentative; and if construed as a performance, it was bad as not being substantively so averred. *Hayward v. Bennett*, 4 D. & L. 228.

6. *Declaration—Breach of contract to execute a lease—Absence of necessary averments.*—A declaration stated that in consideration that the plaintiff and one B. E., now deceased, had, at the special instance and request of the defendant, then and there given and made to the defendant a proposal of 15l. a-year and a fine for certain lands, the defendant then and there undertook and promised the plaintiff and the said B. E. to complete a purchase of the estate and to execute a lease of the premises, and averred as a breach that the defendant did not effect and complete the purchase of the said estate nor execute a lease of the premises. Special demurrer, that there is no averment of a performance of precedent matter by the plaintiff or of a special request by the plaintiff to the defendant to execute the lease; and that there is no averment of a reasonable time having elapsed, or that a conveyance had been tendered by the plaintiff to be executed: Held, that the declaration was bad. *Dolan v. M^r Jerman*. 9 Ir. L. R. 175.

7. *Negative pregnant.*—Trespass quare clausum fregit. Plea, that the close was the freehold of H., wherefore the defendants, as the servants of H. and by his command, committed the trespasses. Replication, that the defendants did not, as the servants of H. and by his command, commit the trespasses: Held, that the replication involved a negative pregnant, and was therefore bad on special demurrer. *Jones v. Jones*, 4 D. & L. 494.

8. *Puis darrein continuance.*—At the sittings after term, a cause having been called on for trial, the defendant filed a plea in the nature of a plea puis darrein continuance, alleging that the matter of defence arose after the several supposed causes of action accrued. In an affidavit contemporaneous with and in verification of the plea, the defendant stated that the matter of the plea had arisen within eight

days last past next before the pleading of the said plea: Held, that the plea was ill, there being no precise averment that the matter of defence had arisen after the last continuance; and *semble*, that even if the averment in the affidavit had been sufficient, it could not be read in support of the plea. The entry on the record of the award of respite to the jury amounts to a continuance. Continuances are from day to day as well as from term to term. Trespass for taking, detaining and impounding goods, and that thereby the goods were lessened and damaged; the plea applied to the taking, &c., and left the lessening and damaging unanswered; plaintiff pleaded over without marking judgment of nil dicit for the part of the declaration uncovered by the plea: Held, that he had not thereby worked a discontinuance. *Atkinson v. Nesbitt*, 9 Ir. L. R. 271.

9. *Statute — Proviso and exception — Condition precedent.*—A local act for paving and improving the town of Salford appointed commissioners for putting it into execution, and authorized them to pave the new streets; and provided that the expenses of such new pavements should be paid and reimbursed to the commissioners by the owners or occupiers of the land adjoining the streets in manner therein mentioned, and empowered the commissioners to recover such expenses by action at law. A subsequent section, commencing "provided always and be it enacted," directed that before the commissioners should cause the streets to be paved as aforesaid, they should in the first place give notice to the owner or occupier of every house, land, &c. adjoining the street, requiring him to pave the same as the commissioners should direct; and if any such owner or occupier should for six months neglect to pave pursuant to the notice, then it should be lawful for the commissioners, and they were thereby required, to cause the same to be done, and to recover the expenses from such owner or occupier as thereinbefore mentioned: Held, that the giving of this notice was a condition precedent to the commissioners executing the paving themselves, and charging the expenses on the owner or occupier, and that it must be averred in the declaration in an action brought under the act for the recovery of such expenses. *The Mayor, &c. of Salford v. Ackers*, 16 M. & W. 85.

10. *Trespass — Colour — Reversion — Condition — Vi et armis — Departure.*—Trespass quare demum fregit. Plea, that M. being seised in fee of the messuage in the declaration mentioned, demised to L. for twenty-one years, who demised it to the defendant for the residue of that term less one day. It then gave colour, that under colour of a charter of demise pretended to be made to the plaintiff, whereas nothing passed by it, &c.; and then justified the trespass. Replication, that before the demise to the defendant by L., he demised to F. for three years, and that F. assigned his term to the plaintiff. Rejoinder, that the demise to F. was subject to a proviso for re-entry reserved to L. his executors, administrators and assigns, in case of non-repair; that the messuage was not kept in repair, and the defendant entered in pursuance of the proviso: Held, first, that the defendant was an assignee within the 32 Hen. 8, c. 34, and could

therefore avail himself of the condition of re-entry; secondly, that although livery of seisin is rendered unnecessary by the 8 & 9 Vic. c. 106, s. 2, in order to pass an estate of freehold, the colour given by the plea did not show a title in the plaintiff; thirdly, that the allegation *vi et armis* does not import a breach of the peace; and fourthly, that the matter alleged in the rejoinder was not a departure from the plea. *Wright v. Burroughes*, 4 D. & L. 498.

11. *Trespass—De injuriâ—New assignment—Impounding distress in house of tenant.*—Trespass for breaking and entering plaintiff's dwellinghouse, locking the doors and expelling the plaintiff. Plea, justifying all the trespasses, except the expulsion, under a distress for rent, alleging that defendant kept and impounded it in his dwellinghouse, &c., and in order safely to impound and keep it necessarily locked and fastened the doors of the dwellinghouse, and afterwards caused the goods to be duly appraised and duly sold to the satisfaction of the rent and costs of distress and sale. Replication, that defendant broke, &c. the house, locked the doors, and seized, took and converted the goods of his own wrong, and for another and different purpose than that mentioned in the plea, i. e. for the purpose of ejecting, &c. the plaintiff from the possession of the dwellinghouse, concluding with a verification. Demurrer. *Semble*, that the replication was bad for not traversing defendant's entry for the purpose of distraining, and concluding to the country, instead of raising an immaterial issue on the intention of the defendant in entering. *Semble* also, that the plea need not aver notice of the distress with the cause of taking to have been given according to 2 Will. & Mary, sess. 1, c. 5, s. 1, and that the plea, having perfectly answered the seizure, was not rendered bad in substance by going on unnecessarily to answer matters of mere aggravation laid in the declaration, viz. the conversion of plaintiff's goods: Held, that the plea should have shown that the house, or that part of it of which the doors were locked, was the most fit and convenient place for securing the distress, or the tenant might be improperly kept out of possession. *Woods v. Durrant*, 16 M. & W. 149.

12. *Trespass—Plea of heriot custom—De injuriâ.*—In trespass for taking chattels, if the defendant justifies the seizure under a heriot custom, the plaintiff may reply *de injuriâ absque tali causa*. And if there are several pleas claiming several heriots in respect of different tenements, one replication *de injuriâ* will suffice. *Price v. Woodhouse*, 16 M. & W. 1; 4 D. & L. 286.

13. *Trespass—Plea justifying breaking and entering a dwellinghouse on suspicion of felony.*—A plea justifying the breaking and entering a house without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him. *Smith v. Shirley*, 3 C. B. 142.

And see AMENDMENT. ANNUITY. BILLS AND NOTES, 2, 3. CASE, 1—5. COAL LEASE. DEMURRER. DETINER. EXECUTOR AND ADMINISTRATOR, 1, 2. FOREIGN JUDGMENT. GUARANTEE.

2. HUSBAND AND WIFE, 1, 2. LIBEL AND SLANDER, 2—6. LIMITATION, 2, 3. MALICIOUS ARREST, 1. PATENT, 2, 3. PAYMENT, 1—4. RELEASE, 2. SHERIFF, 2. TROVER.

POST-MARK. See EVIDENCE, 2.

POSTPONEMENT OF TRIAL. See COSTS, 5.

PRACTICE.—1. *Amending judgment—Plea of non assumpsit in action on bill of exchange.*—Where the defendant pleads non assumpsit to the whole of a declaration, consisting of a count on a bill of exchange and money counts, the plaintiff cannot sign judgment generally. And the court will not allow him to amend the judgment by confining it to the count on the bill on entering a nolle prosequi on the other counts. *Eddison v. Pigram*, 16 M. & W. 137; 4 D. & L. 277.

2. *Appearance of defendant—Affidavit and merits.*—If an attorney be sued in this court in autre droit by bill, no writ having been issued against him, his proper course is to come in and move to set aside those proceedings; if he appear and plead or demur, he waives his objection. If the character of either plaintiff or defendant sufficiently appear on the face of the declaration to found the jurisdiction of this court as to him, that is sufficient to give this court jurisdiction in the action. What is a sufficient affidavit of merits to ground a motion for liberty to plead after a demurrer overruled. *Kehoe v. Wright*, 9 Ir. L. R. 261.

3. *Appearance sec. stat. by plaintiff in person.*—Where a plaintiff sues in person he may in person appear for the defendant sec. stat., although that case is not provided for in the forms given in the schedule to the second section of the Uniformity of Process Act, 2 Will. 4, c. 39. *Smith v. Wedderburne*, 16 M. & W. 104; 4 D. & L. 296.

4. *Attorney's privilege—Waiver.*—Where an attorney is sued as such jointly with an unprivileged person the declaration will be set aside for irregularity, and the circumstance of the defendants having compelled the plaintiffs to give security for costs is not a waiver of the irregularity. *Johnson v. Sparks*, 9 Ir. L. R. 139.

5. *Demurrer—Striking out pleadings.*—On a rule for striking out a demurrer under Reg. Gen. Hil. 4 Will. 4, r. 2, the court set it aside and struck out the pleadings connected with it, the defendant to pay plaintiff's costs of preparing for trial and attending to try the cause and of the application to set aside the demurrer and take short notice of trial, or judgment to be for plaintiff on the whole record. *Tucker v. Barnesley*, 16 M. & W. 54; 4 D. & L. 292.

6. *Frivolous demurrer—Signing judgment—Irregularity.*—In an action by drawer against acceptor of a bill of exchange, the defendant pleaded (amongst other pleas concluding to the country) that the plaintiff indorsed the bill to a person unknown, who at the time of the commencement of the suit was the holder thereof, and entitled to sue the defendant thereon. The plaintiff replied that the said person was not at the time of the commencement of the suit the holder

of the bill, concluding to the country. The plaintiff having added the similiter and delivered the issue, the defendant struck out the similiter to the above replication and demurred specially. A judge at chambers ordered the demurrer to be set aside as frivolous, and that the plaintiff be at liberty to sign judgment on the plea in question. The plaintiff signed judgment on that plea, tried the other issues, and obtained a verdict, the defendant not appearing at the trial. On a motion to rescind the judge's order and set aside the trial and subsequent proceedings: Held, that as the rule did not ask to set aside the issue there was no irregularity in the trial: Held also, Alderson B., dissentiente, that the judgment signed was irregular, there being other pleas on the record covering the whole cause of action. *Tad v. Bulkeley*, 4 D. & L. 306.

7. *Judge's order—Making it a rule of court—Reg. Gen. Trin. Term, 3 Vic.*—A motion to make a judge's order a rule of court, and for the costs of the application, is absolute in the first instance: made upon the affidavit required by Reg. Gen. Trin. Term, 3 Vic. *Black v. Lowe*, 4 D. & L. 285.

8. *Particulars—Stay of proceedings.*—Where a defendant obtains an order for particulars with a stay of proceedings, he may give notice of abandoning the order for particulars and demur or plead to the declaration without getting the original order rescinded. *Mander v. Collett*, 4 D. & L. 456.

9. *Particulars—Stay of proceedings—Time to plead after dismissal of summons for particulars.*—Where a defendant, having obtained an order for time to plead, takes out a summons for particulars, which is dismissed after the expiration of the time given for pleading, he is entitled only to the remainder of the same day for pleading. *Mengens v. Perry*, 15 M. & W. 537.

10. *Peremptory order for time to plead, effect of.*—An order peremptory for time to plead does not preclude the defendant from again applying by summons for further time, and if he take out such further summons judgment signed for want of a plea after the summons is returnable is irregular. *Beazley v. Bailey*, 16 M. & W. 58; 4 D. & L. 271.

11. *Peremptory undertaking, enlarging.*—A plaintiff, who is prevented by accident from trying pursuant to his peremptory undertaking, should come to the court to have it enlarged, and not proceed to trial after the time limited in his peremptory undertaking has expired; and where he did not do so, but gave a fresh notice, and proceeded to trial after the time limited by his undertaking had expired and obtained a verdict in the absence of the defendant, who refused to attend, the court set aside the verdict so obtained with costs. *Bushell v. Slack*, 4 D. & L. 388.

12. *Short notice of trial.*—Where a defendant is under terms to take short notice of trial, if necessary, it lies upon the plaintiff to show the necessity of a shorter notice than the ordinary one. And where the defendant being under such terms, the plaintiff delivered a replication on the 14th May, which on the 19th he abandoned and deli-

vered another with the similiter added ; on the 21st obtained an order to try before the sheriff ; on the 23rd delivered the issue with notice of trial on the 28th ; and on the latter day tried the cause as undefended and obtained a verdict, the court set it aside with costs on the ground that the plaintiff had had time to give the ordinary notice. *Drake v. Pickford*, 15 M. & W. 607.

13. *Signing judgment—Motion for new trial after the four days.*—Leave was given to a defendant to move for a new trial after the first four days of a term, but the name of the case was not inserted in the new trial motion paper, nor was any notice of the circumstances given to the plaintiff. The plaintiff signed judgment on the fifth day of the term. A rule for a nonsuit or new trial was afterwards served on the plaintiff's attorney. A rule was granted to discharge that rule, but was ordered to stand over till the merits of the first granted rule should be disposed of. The defendant's proper course would have been to have moved to set aside the judgment. *Lloyd v. Berkovitz*, 16 M. & W. 31.

14. *Striking out counts on same subject-matter—Lateness of motion—Appeal to court from judge.*—A defendant applied by summons at chambers to strike out counts, on the ground that they related to the same subject-matter of complaint. The summons was heard on the 14th of November, when it was dismissed with costs. On the 19th the defendant made a similar application to the court: Held, too late. *Semble*, that an appeal lies to the court where a judge has refused to make an order. *Chapman v. King*, 4 D. & L. 311.

15. *Trial of issues in fact—Demurrer—Writ of error.*—Where there are issues in fact as well as in law on the same record, and the defendant has obtained judgment on demurrer to pleas going to the whole cause of action, but the issues in fact remain untried, the court will not compel the defendant to enter up a judgment of nil capiat per breve before the trial of the issues in fact, in order that the plaintiff may bring a writ of error without trying the issues in fact. *Hinton v. Acraman*, 4 D. & L. 462.

16. *Waiver of irregularity.*—Taking out an attested copy of a declaration waives an irregularity in the notice of its being filed and the rule to plead. *Cannon v. Wellington*, 9 Ir. L. R. 138.

And see ARREST. COSTS. DEMURRER. JUDGMENT AS IN CASE OF NONSUIT. NISI PRIUS. QUARE IMPEDIT. RELEASE, 1. STAYING PROCEEDINGS. VENUE.

PRESENTMENT. See CERTIORARI.

PRINCIPAL AND SURETY. — *Composition deed—Reserve of remedies against sureties.*—The plaintiff, a shareholder in a banking company, became a surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition deed, to which the plaintiff and the banking company were parties, whereby he assigned his property to trustees for the benefit of his creditors ; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having

been compelled to pay the debt to the banking company: Held, that he was entitled to recover back the amount in an action for money paid from the defendant. *Kearsley v. Cole*, 16 M. & W. 128.

And see BOND, 1.

PROCESS.—1. *Capias*—*Amendment*—*Variance of writ and copy*.—Where, in a writ of *capias*, and in the copy thereof served on the defendant, it was directed to the sheriffs instead of the sheriff of Middlesex: Held, that this was an irregularity; that though the court or a judge might amend the writ, they had no power over the copy, and that the defendant was entitled to discharge, though the writ was amended, on the ground of the variance from it of the copy. *Moore v. Magan*, 16 M. & W. 95; 4 D. & L. 267.

2. *Execution*—*Arrest under ca. sa. after death of judgment creditor*.—A writ of *ca. sa.* issued in the lifetime of the judgment creditor may be executed after his death. *Ellis v. Griffith*, 16 M. & W. 106; 4 D. & L. 279.

3. *Summons*—*Description of defendant's residence*.—The copy of a writ of summons served on the defendant described him as J. S., late of B., in the county of York, but now in the Castle, in the city of York: Held sufficient, it not being shown that there was not a place called the Castle within the city of York, though it was sworn that York Castle is in the county of York. *Balman v. Sharp*, 16 M. & W. 93.

4. *Summons*—*Defendant's residence*—*Service of writ*.—A writ of summons, describing a company as now or late carrying on business in King William Street, in the city of London, is defective, and service of the writ on a director in the county of Middlesex is irregular. *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 4 D. & L. 450.

PROVISO. See PLEADING, 9.

PUIS DARREIN CONTINUANCE. See PLEADING, 8.

QUARE IMPEDIT.—*Practice*—*Striking out counts*.—The rules of Hil. Term, 4 Will. 4, do not apply to actions of *quare impedit*. In *quare impedit* the declaration contained six counts, all founded upon the same title, but taking it up from different periods: The court refused to put the plaintiff to his election upon which of the counts he would rely. *Tolson v. The Bishop of Carlisle*, 3 C. B. 41.

QUIET ENJOYMENT. See LANDLORD AND TENANT, 8.

RAILWAY COMPANY. See EJECTMENT, 3.

RECORD. See VARIANCE.

REFUSING VOTE. See CASE, 1, 2, 3.

REGISTRATION OF DEEDS.—*Stat. 7 Ann, c. 20*—*Registration of Middlesex*—*Lithographed memorials*.—Under stat. 7 Ann, c. 20, the registrar of Middlesex is bound to register the memorial of a deed, though the body of such memorial is lithographed, if it be

properly stamped and executed. *Reg. v. The Registrar of Middlesex*, 7 Q. B. 156.

RELEASE.—1. *Suit in formâ pauperis—Attorney's lien—Lateness of motion.*—A plaintiff sued in formâ pauperis, and after action brought executed a release to the defendants; the release having been pleaded puis darrein continuance, the court set it aside on the application of the plaintiff's attorney. It is not too late to apply on the 8th of June to set aside such a plea, which had been delivered on the 22d of April. *Wright v. Burroughes*, 4 D. & L. 226.

2. *Tender of release for execution.*—To an action on a bill of exchange, &c. the defendant pleaded that it was agreed between the plaintiff and other creditors of the defendant that a sum of 4s. 6d. in the pound should be paid by the defendant to the plaintiff and the other creditors, and that upon receiving the money the plaintiff and other creditors should execute a release of their debts; that a release was prepared for execution; and that the creditors, except the plaintiff, received the composition, and executed the release; and that the defendant had always been ready and willing to pay the plaintiff 4s. 6d. in the pound upon the plaintiff executing such release. *Semble*, that the plea was bad, for want of an averment that the defendant tendered a release to the plaintiff for execution. *Rosling v. Muggeridge*, 4 D. & L. 298.

REPLEVIN. See TRESPASS, 3.

RESTRAINT OF TRADE. See MASTER AND SERVANT.

RETURNING OFFICER. See CASE, 1, 2, 3.

REVENUE. See EXCHEQUER. EXCISE.

REVERSION. See PLEADING, 10.

RULE OF COURT. See PRACTICE, 7.

SALE OF GOODS. See STAMP.

SCI. FA.—*Reviver—Affidavit, by whom to be made.*—An affidavit to ground a motion for a sci. fa. to revive a judgment at suit of a banking company, made by the solicitor of the company, is not sufficient, unless the facts deposed to be within his actual knowledge. *Bank of Ireland v.* —, 9 Ir. L. R. 266.

SHERIFF.—1. *Bailiff's fees—Attorney, not client, liable for.*—The attorney who engages the service of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process. *Walbank v. Quarterman*, 3 C. B. 94.

2. *Case against sheriff for extortion—Special demurrer.*—The 1 Vict. c. 55, for increasing the remuneration to be paid to sheriffs on executing process, has not repealed the penalty for extortion imposed by the 29 Eliz. c. 4, and in suing for such penalty it is sufficient to declare upon the statute of Elizabeth. If the defendant relies upon the statute of Victoria, he must plead it by way of defence. A declaration on the statute of Elizabeth stated that the defendant, by colour of

his office, took for executing a writ a large sum of money, to wit, 16*l.*, being a larger recompense than by the said statute is limited, that is to say, a large sum, to wit, 15*l.* more than is by the said act limited, whereby the plaintiff is damaged to the amount of 15*l.*: Held bad, on special demurrer. *Pilkington v. Cooke*, 4 D. & L. 347.

3. *Interpleader rule—Trespass.*—Under a *fi. fa.* against goods of M., the sheriff entered the apartments of H., who was a lodger in the house of M., and there seized certain goods; H. claimed them and the sheriff applied to the Court of Exchequer, out of which the *fi. fa.* issued, under the 1 & 2 Will. 4, c. 58, s. 6 (the Interpleader Act). An issue was directed to try the right to the goods, and in it H. succeeded. H. afterwards brought an action of trespass in the court for entering the apartment. The court refused to stay proceedings in that action, as the order made in the Exchequer in the action there only affected the goods seized, and did not extend to the trespass which formed the subject of the latter action. *Semble*, that if the interpleader order did extend to such a case, the proper course was for the sheriff to apply to the Court of Exchequer. *Hollier v. Laurie*, 4 D. & L. 205.

And see *COGNOVIT*, 4.

SHIP. See *CASE*, 5. **CHARTER PARTY.**

SIGNING JUDGMENT. See *PRACTICE*, 1, 6, 10, 13.

SLANDER. See *LIBEL AND SLANDER*, 4, 5, 6.

SMALL DEBTS ACT.—*Habeas corpus—Commitment under 8 & 9 Vict. c. 127.*—Under the 8 & 9 Vict. c. 127, s. 1, a party may be imprisoned for nonpayment of a debt not exceeding 20*l.* due upon a judgment, although the judgment debt originally exceeded 20*l.* A warrant of commitment under that act, by the judge of the Palace Court, ordered that the defendant should be committed for the term of twenty days to the common gaol wherein debtors under judgment and in execution of the superior courts of justice may be confined in the county of Surrey; and was directed to H. H., an officer of the said court, and to the keepers of the debtors' prison abovementioned for the county of Surrey; and the defendant was imprisoned under it in Horsemonger Lane Gaol, being the only debtors' prison for the county of Surrey: Held, first, that the warrant was properly directed to and executed by H. H., notwithstanding sect. 13 of the act, saving the right of the high bailiff of Westminster to the execution of process; 2nd, that the twenty days' imprisonment began to run from the time of the defendant's being actually lodged in prison under the warrant; and 3rd, that the place of imprisonment was sufficiently designated in the warrant. *Ex parte Foulkes*, 15 M. & W. 612.

SPECIFICATION. See *PATENT*, 4.

SPIRITS. See *EXCISE*.

STAMP.—*Contract relating to the sale of goods.*—The following memorandum was handed by the defendant, a trader, to plaintiff, an auctioneer: "Memorandum of 107*l.* had by me of S. (plaintiff),

being an advance on books sent in for immediate sale by auction," signed by the defendant. The books were sold, and an action having been brought by the auctioneer for a balance due to him on the sale, the above memorandum was held to relate to the sale of goods, and therefore to be admissible in evidence without a stamp under the exemption in 55 Geo. 3, c. 184, sched. tit. (A.) Agreement. *Southgate v. Bohn*, 16 M. & W. 34.

And see LANDLORD AND TENANT, 6.

STATUTE. See PLEADING, 9.

STAYING PROCEEDINGS.—1. *In second action for same cause.*—Where in an action of debt for work and labour the plaintiff obtained a verdict, but the court granted a new trial on the ground that he ought to have declared specially, and he thereupon, without discontinuing that action, brought another for the same cause in assumpsit, declaring specially, the court stayed the proceedings in the latter until the former was disposed of. *Haigh v. Paris*, 18 M. & W. 144; 4 D. & L. 325.

2. *Separate actions against different members of provisional committee.*—Eleven separate actions were brought against eleven members of a provisional railway committee respectively for the same cause of action; the defendant applied to stay the proceedings in the actions except in that one which the plaintiff should elect, but the court refused the application. *Giles v. Tooth*, 4 D. & L. 486.

And see BOND, 2. PRACTICE, 8, 9.

STRIKING OUT PLEADINGS. See PRACTICE, 5, 14.
QUARE IMPEDIT.

SUGGESTION. See MIDDLESEX COURT OF REQUESTS.

SUMMONS. See PROCESS.

SURPLUSAGE. See EXECUTOR AND ADMINISTRATOR, 2.

TAXATION. See COSTS, 6, 7.

TENDER. See RELEASE, 2.

TITHES.—1. *Limitation act—Operation of, as to tithes.*—The limitation act, 3 & 4 Will. 4, c. 27, s. 2, enacts, that no person shall bring an action to recover any land, which by section 1 includes tithes, but within twenty years next after the right to bring such action has accrued to him, or some person through whom he claims: Held, that this statute does not operate to prevent the titheowner from recovering tithes as chattels from the occupier, although none had been set out for twenty years, but that it is confined to cases where there are two parties, each claiming an adverse estate in the tithes. *The Dean and Chapter of Ely v. Cash*, 15 M. & W. 617.

2. *Proceedings for recovery of tithes.*—Since 5 & 6 Will. 4, c. 74, if any tithe, oblation or composition, not excepted in the 7 & 8 Will. 3, c. 6, or exceeding 10*l.* yearly value, due from any one person, is in arrear, it must be proceeded for before two justices, and if the title of the claimant or liability of the party sought to be charged is un-

disputed, two years' arrears may be there recovered; whereas, if such title or liability is denied *vivâ voce* before the justices or at any time in writing, the claimant may proceed by suit in equity and recover six years' arrears. *Robinson v. Purday*, 16 M. & W. 11.

TITLE OF COURT. See **VARIANCE**.

TRESPASS.—1. *Attachment—Marshal—Notice of action.*—A city attachment having issued against A., and having been placed in the hands of the city marshal to execute, he seizes the goods of B.: the execution creditor not being present at the seizure, and not having given the marshal any indemnity, is not liable in an action of trespass *de bonis asportatis* at the suit of B. The city marshal is not an officer within the meaning of the 3 & 4 Vict. c. 108, s. 204, and therefore is not entitled to a month's notice before action brought. *Smith v. Holbrooke*, 9 Ir. L. R. 155.

2. *Attorney, liability of, for obtaining warrant and causing it to be executed.*—If attorneys conducting the business of a fiat in bankruptcy take out a summons to attend before a commissioner under stat. 6 Geo. 4, c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who when it was ready gave the messenger notice to take it; although the attorneys, in applying for the warrant, used urgency, and, being told by the commissioner that they must take it at their peril, said they would do so. *Cooper v. Harding*, 7 Q. B. 928.

3. *Replevin.*—A judgment recovered in replevin is not a bar to an action of trespass for the same taking and detention of goods which formed the subject of the replevin suit. *Atkinson v. Nesbitt*, 9 Ir. L. R. 271.

And see **PLEADING**, 7, 10, 11, 12, 13. **SHERIFF**, 3.

TROVER.—*Pleading—Former recovery for conversion against third party.*—Declaration in trover for a bedstead. Plea, that before the commencement of the suit the plaintiff recovered judgment in trover against W. for converting the same bedstead, and received from W. the amount of damages and costs in that action, which said damages were the full value of the bedstead; that the said conversion by W. was a conversion not later than the conversion in the declaration mentioned; and that before the conversion in the declaration mentioned, W. sold the bedstead to the defendant, and that the taking under such sale was the conversion alleged in the present action. Held, on special demurrer, that the plea was good. *Cooper v. Shepherd*, 4 D. & L. 218.

USE AND OCCUPATION. See **EXECUTOR AND ADMINISTRATOR**, 2.

USURY.—*Charge on land—Judgment.*—The proviso in the 2 & 3 Vict. c. 37, s. 1, contemplates a direct and immediate security upon

the land. Therefore a loan at more than five per cent. upon bills of exchange and upon a warrant of attorney authorizing the party to whom it is given to enter up judgment immediately, with a defeazance that execution shall not issue until default of payment of the bills of exchange, is not "a loan or forbearance of any money upon security of any lands," &c. within the meaning of the proviso in the 2 & 3 Vict. c. 37, s. 1, although a judgment duly signed and registered is "a charge upon the land" under the 1 & 2 Vict. c. 110, ss. 13, 19. *Lane v. Horlock*, 4 D. & L. 408.

VARIANCE.—*Trial by the record*—*Title of court*.—In debt on a judgment, the declaration described it as obtained "in the court of our lady the queen of her bench here at Westminster, in the county of Middlesex." Plea, that there is not any record of the said supposed recovery remaining in the said court of our lady the queen, before the queen herself at Westminster (named in the declaration the court of our lady the queen of her bench at Westminster), in manner and form, &c. Replication, that there is such a record of the said recovery remaining in the said court of our lady the queen of her bench here in manner and form as the plaintiff hath in the said declaration above alleged. Held, that the issue was proved by the production of a judgment of the Court of Common Pleas. *Bradley v. Gray*, 4 D. & L. 458.

And see **GUARANTEE**, 2.

VENDOR AND PURCHASER.—*Recovery of deposit*.—S., the owner of a farm, orally employed defendant to sell it for him. Defendant, without naming the seller, agreed by written memorandum to sell the farm to the plaintiff for 2700*l.*, and gave instructions to an attorney to prepare a contract of sale by S. to plaintiff. Plaintiff paid defendant 100*l.* deposit in part of the purchase-money, and afterwards signed the contract for sale by S. to himself; by which contract he agreed to pay down immediately on its execution 100*l.* as a deposit, for which S. undertook to pay interest at four per cent. till the completion of the purchase. The contract was afterwards rescinded for want of title in the seller, S. Defendant, before he had notice of the rescinding, paid S. 50*l.* and retained the other 50*l.*, though without the consent of S., under an agreement by S. to give him one-half of any amount above 2600*l.* which defendant might get for the farm. Held, that plaintiff could not recover any part of the 100*l.* from defendant. *Hurley v. Baker*, 16 M. & W. 26.

VENUE.—1. *Changing venue*—*Action by attorney*.—In an action by an attorney since the Uniformity of Process Act, he does not waive his privilege of retaining the venue in Middlesex by suing in person without naming himself an attorney on the record. *Cutts v. Surridge*, 4 D. & L. 373.

2. *Changing venue*—*Cause of action arising partly abroad*.—Where the venue had been changed on the usual affidavit, the court made absolute a rule to bring it back to the original county in which it had been laid, on affidavit that part of the cause of action arose

abroad, and not in this country. *Cundell v. Harrison*, 4 D. & L. 431.

VERDICT. See *NISI PRIUS*.

VI ET ARMIS. See *PLEADING*, 10.

VOTER. See *CASE*, 1, 2, 3.

WAIVER. See *PRACTICE*, 4, 16.

WARRANT OF ATTORNEY.—*Attestation by person not qualified as an attorney*—*Who may take advantage of the defect*—*Stat. 1 & 2 Vict. c. 110, s. 9.*—Judgment was entered up on a warrant of attorney executed by principal and sureties. One surety being arrested paid the debt and recovered a proportional part from his co-surety, who afterwards discovered that the warrant had been attested by a person not qualified to act as an attorney, contrary to stat. 1 & 2 Vict. c. 110, s. 9. Held, that the co-surety, not being the party who had paid the debt, could not move the court that the warrant should be set aside for the defective attestation, and the amount of his contribution repaid him by the plaintiff; and a rule nisi, obtained by the co-surety for this purpose, was discharged without costs. *Semble* (per Patteson, J.), that under stat. 1 & 2 Vict. c. 110, s. 9, a party who has introduced an unqualified person as qualified to attest the execution of a warrant of attorney, cannot afterwards move to set it aside because attested by such person. *Price v. Carter*, 7 Q. B. 838.

WHARFINGER. See *CASE*, 5.

WITNESS. See *ATTORNEY*. *COSTS*, 5.

WRIT OF CAPIAS. See *ARREST*. *PROCESS*, 1, 2.

WRIT OF ERROR. See *PRACTICE*, 15.

WRIT OF SUMMONS. See *PROCESS*, 3, 4.

CRIMINAL AND MAGISTRATES' CASES.

7 Q. B. part 4. 4 D. & L. part 2.	Contained in	2 New Sess. Cas. parts 6 and 7. 9 Ir. L. R. parts 3, 4 and 5.
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ACKNOWLEDGMENT. See REMOVAL, 9, 10, 11, 14.

ADJOURNED SESSIONS. See REMOVAL, 1.

AFFIDAVIT. See EVIDENCE. PLEADING.

APPEAL. See LUNATIC PAUPER, 2. REMOVAL, 1—5.

APPRENTICESHIP.—1. *Indenture—Ordinary or parochial.*—The examination on which an order of removal was founded stated that J. W. J. was, by and with his own consent, (his parents being dead,) bound by indenture of apprenticeship, dated, &c., which was duly stamped and executed, to serve R. M. S. as an apprentice for the term of six years, &c., the indenture being proved to have been lost: Held, that it sufficiently appeared from the examination that it related to an ordinary and not a parish apprenticeship. *R. v. St. Anne, Westminster, (Re Jones),* 2 New S. C. 517.

2. *Lost indenture—Secondary evidence—Register insufficient as not showing order of justices for binding.*—The examinations on which an order of removal was made stated a settlement by apprenticeship, and secondary evidence of the indenture, which was lost, by an extract from the register of parish apprentices, kept under the 42 Geo. 3, c. 46, which contained an entry of two justices assenting to the binding. At the trial of an appeal against the order, the sessions found that the examinations were insufficient, as though it appeared from them that the justices had allowed, by signing and sealing an indenture, which indenture recited an order for binding, under the 56 Geo. 3, c. 139, there was no sufficient legal evidence in them of a parish apprenticeship: Held, that the sessions were right. *Reg. v. The Inhabitants of East Stonehouse,* 2 New S. C. 588.

ATTACHMENT. See EVIDENCE.

BAIL. See CERTIORARI, 3.

BASTARD.—*Order of filiation—Attendance of putative father in person or by attorney.*—An order in bastardy, under the 8 & 9 Vict. c. 10, (which enables a putative father to appear by attorney or counsel,) stated that the putative father appeared in person, and in a subsequent part that the evidence was received in the presence and

hearing of the attorney attending on his behalf: Held sufficient. *Reg. v. Shipperbottom*, 2 New S. C. 641.

BRICKFIELDS. See **RATING**, 2.

BRIDGE.—*Liability to repair in parish newly added to a borough.*—*Boundary and Municipal Corporation Acts.*—A borough, incorporated by charter with a non-intromittant clause, was enlarged, under stats. 2 & 3 Will. 4, c. 64, s. 35, and 5 & 6 Will. 4, c. 76, s. 7, by the addition of a parish in the same county, containing a bridge, which until that time the county had repaired. There was no evidence that the borough had been used to maintain any bridges: Held, that the transfer of the new district did not render the borough liable to repair the bridge. *Reg. v. The Inhabitants of New Sarum*, 1 Q. B. 941.

CERTIORARI.—1. *Case reserved by the sessions.*—*Practice.*—*Additional points not reserved.*—Where a writ of certiorari has been granted to bring up an original order, and also a special case from the court of quarter sessions, this court will not permit any other objections to be taken than those reserved by the special case, although it was mentioned to the court when the writ was moved for that it was intended to make such other objections; and although the rule upon which the argument took place was to show cause why the original order, as well as the order of sessions, should not be quashed, the points reserved by the special case not applying to the original order at all. *Reg. v. The Inhabitants of Hartbury*, 2 New S. C. 648.

2. *Same.*—When a case is granted by sessions for the opinion of this court, the party at whose instance the case is granted must either proceed with the case reserved, waiving any other objections to the order of removal, or must abandon the case, and rely on any other objections which may be raised when the order is brought up by certiorari. *Reg. v. The Inhabitants of St. Anne, Westminster*, (*In re Jones*), 2 New S. C. 517.

3. *Masters and Servants Act.*—*Conviction.*—*Prisoner.*—*Bail.*—*Recommitment.*—Where a certiorari had issued to bring up a conviction under the Masters and Servants Act (4 Geo. 4, c. 34) for the purpose of being quashed for defects on the face of it, the court admitted the defendant, who was in prison under the conviction, to bail. *Seemle*, that the court has power, in case the conviction be affirmed, to recommit the defendant for such further time as he would otherwise have passed in prison. *Ex parte Lord*, 4 D. & L. 405.

And see **CONSPIRACY**.

CHURCH RATE. See **RATING**, 1.

COMMITMENT. See **CERTIORARI**, 3. **EXCISE**, 1.

CONSPIRACY.—*Indictment.*—*Naming parties aggrieved.*—*Overt acts.*—*Sentence of imprisonment at the sittings under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9.*—*Bringing postea before court of error.*—*Certiorari.*—Indictment charged that the defendants conspired to cheat and defraud certain liege subjects of the queen, being trades-

men, of divers large quantities of their goods; that in pursuance of the conspiracy, defendant B. fraudulently ordered and obtained upon credit, from W. W. and C. W., upholders, divers goods, to wit, &c., of the said W. W. and C. W.; the count then stated a like obtaining on credit from other tradesmen named, and from others whose names were unknown; and that in further pursuance, &c., and in order that the said goods might be taken in execution and sold as after mentioned, the defendants ordered the same to be delivered by W. W. and C. W., &c. at the house of B., one of the defendants; and they were so delivered and never paid for: and in further pursuance, &c., and in order, &c., B. allowed them to continue in her house till they were taken in execution as after mentioned. That defendants, in further pursuance, &c., did falsely and fraudulently pretend that certain debts were due from defendant B. to K. and P., two others of the defendants; and K. and P. did, to obtain payment of such fictitious debts, by collusion with B., commence actions against B.; that in further pursuance, &c., K. and P. collusively signed judgment against B. in the said actions, and issued execution thereon, by virtue of which the said goods, before the expiration of the times of credit, were taken in execution and sold to satisfy the said fictitious debts: and so the jurors, &c., found that the defendants, in manner and means aforesaid, did cheat and defraud the said W. W. and C. W., &c., of the said goods. Defendants being convicted and sentence passed at the sittings, under stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, and motion made to arrest the judgment for defect in the indictment: Held, by the Court of Queen's Bench, that the judgment was good: Error being brought upon the judgment: Held, by the Court of Exchequer Chamber, that the indictment was bad; for that the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named or an excuse stated for not naming them; and that the allegation of conspiracy was not aided by the overt acts; and that the overt acts themselves did not, either in connection with the allegation of conspiracy or independently, amount to indictable misdemeanours. Error being assigned on the ground that the sentence pronounced at nisi prius was faulty, the court refused to notice a statement of the sentence embodied in the transcript of the record, but required the plaintiffs in error to bring up the *postea* itself with the sentence indorsed, and they granted a certiorari for that purpose. *Semble*, that, under the statute, a sentence that defendant be imprisoned for a term commencing from the time when he shall be actually taken into custody is correct. *Quære*, whether in such sentence it be necessary to use the words "it is considered." Judgment being reversed, defendant K., who was still under imprisonment, was discharged by order (in vacation) of a judge of the Court of Queen's Bench sitting at chambers. *Reg. v. King, King v. Reg.* 7 Q. B. 782.

CONVICTION. See CERTIORARI, 3. EXCISE, 1. MANDAMUS, 1.

CORONER.—*Fees—Allowance by justices.*—Where justices at quarter sessions had refused to allow a coroner his fees and disbursements in respect of two inquests held by him, on the ground that the inquests had been improperly held; the court, on application for a mandamus to the justices to allow such fees and disbursements, held that they would not interfere with the discretion exercised by the justices with respect to the fees due to the coroner as remuneration for his own trouble, but made the rule absolute for the repayment of the sums of money which had been disbursed by the coroner. *Reg. v. The Justices of Carmarthenshire*, 2 New S. C. 679.

COSTS. See HIGHWAY, 5. **MANDAMUS**, 2.

CRIMINAL INFORMATION. See HIGHWAY, 4.

CROWN OFFICE SUBPCENA. See EVIDENCE.

DERIVATIVE SETTLEMENT. See REMOVAL, 11.

DILATORY PLEA. See PLEADING.

DISCHARGE. See CONSPIRACY.

DISTRESS WARRANT. See RATING, 4.

EMANCIPATION. See REMOVAL, 11.

ERROR. See CONSPIRACY.

EVIDENCE.—*Crown office subpoena to give evidence as to a settlement—Disobedience—Attachment—Affidavit must show complaint.*—The affidavits in support of an application for an attachment for disobedience to a crown office subpoena to appear and give evidence before justices touching a pauper's settlement, must show that a proper complaint was made to the justices. *Reg. v. Vickery*, 2 New S. C. 566.

And see APPRENTICESHIP, 1, 2. **HIRING AND SERVICE.** REMOVAL, 6—14.

EXAMINATION. See HIRING AND SERVICE. REMOVAL, 11—15. **LUNATIC PAUPER**, 2.

EXCHEQUER. See EXCISE, 2.

EXCISE.—1. *Commitment—Conviction—Appeal—Evidence.*—Stat 7 & 8 Geo. 4, c. 53, s. 82, (Excise) gives to the party aggrieved by the decision of justices as to any breach of the excise laws, a right of appeal to the quarter sessions, provided certain notices be given. By section 84, the justices of quarter sessions are required to rehear upon oath and to re-examine the same witnesses, and no others, on which the original judgment was given; and they are empowered, on such appeal, to reverse or confirm, in the whole or in part, the judgment appealed against, or to give such new or different judgment as they in their discretion shall think fit. On an information containing four counts, the justices acquitted the defendants on the first, second and third counts, but convicted him on the fourth, whereon he gave notice of appeal against the said judgment: Held, that the notice was limited to the judgment on the fourth count, and

that as the informant had not given notice of appeal from the rest of the judgment, the evidence before the court of appeal must be confined to the fourth count. *Reg. v. Gamble*, 2 New S. C. 687.

2. *Practice of the Court of Exchequer*.—When a case is stated for the opinion of the Court of Exchequer, under the provisions of sect. 84, it is not necessary that the record should be brought before this court by certiorari; it is enough if all the facts are made to appear on affidavit. *S. C. ib.*

FORMER ORDER. See LUNATIC PAUPER, 1. REMOVAL, 6, 7, 8.

GROUND OF APPEAL. See REMOVAL, 16, 17.

GUARDIANS. See REMOVAL, 10.

HIGHWAYS.—1. *Appointment of surveyors*.—Where at a vestry meeting for the nomination of overseers, the parish proceed to elect surveyors of highways, the appointment of the surveyors will be invalid, unless notice of the meeting be given "three days at the least" beforehand under sect. 1 of the 58 Geo. 3, c. 69. *Reg. v. Best*, 2 New S. C. 655.

2. *Same*.—It is not competent to justices under the 5 & 6 Will. 4, c. 50, s. 11, to appoint a surveyor of highways at the same special sessions at which they receive notice of the office being vacant. Section 11 is not directory only. *S. C. ib.*

3. *Concurrent rates*.—Concurrent rates are invalid if made for the same period of time, but a second rate may be made where a former rate for the same purpose has not been wholly collected. *S. C. ib.*

4. *Criminal information for non-repair of highway, where bill ignored by grand jury interested*.—Where the grand jury had ignored a bill of indictment against a parish for non-repair of a highway, some of the jury being landowners in the parish, and taking part in the discussion as to whether the bill should be found, the court granted a criminal information against the inhabitants of the parish for the non-repair of the highway. *Reg. v. The Inhabitants of Upton St. Leonards*, 2 New S. C. 582.

5. *Order directing indictment under 5 & 6 Will. 4, c. 50, s. 94—What it must show—Costs*.—An order directing an indictment for non-repair of a road, under stat. 5 & 6 Will. 4, c. 50, ss. 44, 95, must show on the face of it that it was made at a special session for the highways held within the division in which the road is situate. If it do not, it is void, and an order for costs, made under s. 95, by the judge who tried the cause, will be set aside. *Reg. v. The Inhabitants of Hickling*, 7 Q. B. 890.

6. *Order of justices for apportioning highway under stat. 34 Geo. 3, c. 64, s. 1—Finding of justices, when conclusive*.—By statute 34 Geo. 3, c. 64, when the boundary of two parishes lay along the centre of a highway, justices were empowered, on information of the fact, to summon the surveyors of the respective parishes, hear the parties and their witnesses, and finally determine the matter by order, apportioning the highway between the parishes for the purpose of

repair. Forms of information, summons and order were given. By an order under this act, justices recited an information laid before them, that one side of a certain highway was in and repairable by parish H., and the other side in and repairable by parish W., praying an apportionment; that they had summoned the surveyors, who attended, and that they had examined witnesses; and they ordered that the highway should be apportioned between H. and W., dividing it by a transverse line. The order contained no direct finding that the sides of the highway were respectively in H. and W., but the statute form was correctly followed. On indictment for non-repair of the part allotted to H.: Held, that the justices must be taken to have considered the question, whether or not part of the highway was in H. and to have decided by their order that it was; and that the fact could not be questioned on trial of an indictment, the subject matter being within the jurisdiction of the justices, and their finding of the fact conclusive. *S. C. 7 Q. B. 880.*

HIRING AND SERVICE.—*Examination, sufficiency of.*—An examination in support of a settlement by hiring and service stated. "I duly entered upon the said service, and continued in the same for a whole year; and during the said service, and under the same, I resided and slept in the said parish of C.:" Held, that the expression of "during the said service," taken with reference to the rest of the examination, must mean during the whole of the service. *Reg. v. The Inhabitants of Clixby, 2 New S. C. 619.*

INDENTURE. See APPRENTICESHIP, 1, 2.

INDICTMENT. See BRIDGE. CONSPIRACY. HIGHWAYS, 1, 2, 3.

JURISDICTION OF SESSIONS. See REMOVAL, 2, 4, 12.

LUNATIC PAUPER.—1. *Former order of sessions quashed by this court—Conclusiveness—Explanation.*—An order of justices under the 9 Geo. 4, c. 40, as to the settlement and maintenance of a lunatic pauper, adjudged the settlement to be in A., and directed the overseers of that parish to repay the overseers of D. the sum of 14l. 12s. for the expenses incurred by D. in the removal, maintenance, &c. of the pauper. This order was appealed against and confirmed by the sessions; but on a case reserved, this court quashed the order of sessions generally, on the ground that the sessions had no power to order the repayment to the overseers. Another order of justices was then made between the same parties, adjudging the settlement as before, but directing a weekly sum for maintenance, &c. of the pauper to be paid by A. to the keeper of an asylum where the pauper was confined. On appeal, the sessions quashed this order, on the ground that the order of this court was conclusive as to the settlement: Held, that the sessions were wrong, as the judgment of this court did not turn on a question of settlement. *Reg. v. The Inhabitants of St. Peter's, Droitwich, 2 New S. C. 531.*

2. *Order of maintenance—Appeal—Copies of examination—Adjudication of settlement.*—Whatever provisions in the 79th section of the 4 & 5 Will. 4, c. 76, are applicable to the case of a pauper lunatic,

are to be incorporated in the 8 & 9 Vict. c. 126, and therefore copies of the examination upon which an order for the maintenance of a pauper lunatic is made, must be sent together with the order. In an appeal against an order of maintenance, which recited an adjudication of the settlement, the settlement may be contested. *Reg. v. The Justices of Middlesex*, 2 New S. C. 661.

MANDAMUS.—1. *To justices to enforce summary conviction refused.*—This court in its discretion refused to grant a mandamus to justices to enforce a summary conviction by warrant of distress or commitment. *Re Williams*, 2 New S. C. 570.

2. *To sessions—Costs of—Mistake of sessions.*—Where the sessions had dismissed an appeal, on the ground that the previous sessions had improperly entered and respited the appeal, the appellants having had time to give notice and come prepared to try the appeal at those sessions, and this court having made a rule absolute for a mandamus to the sessions to hear the appeal: Held, that the respondents ought to pay the costs of the mandamus, under the 1 Will. 4, c. 21, s. 6. *Reg. v. The Justices of London*, 2 New S. C. 568.

MASTER AND SERVANTS ACT. See **CERTIORARI**, 3.

MUNICIPAL CORPORATIONS ACT. See **BRIDGE**.

NEW TRIAL. See **PRACTICE**.

NOTICE OF APPEAL. See **REMOVAL**, 1, 2.

ORDER OF JUSTICES. See **BASTARD**. **HIGHWAYS**, 6.

ORDER OF MAINTENANCE. See **LUNATIC PAUPER**, 1, 2.

OVERT ACTS. See **CONSPIRACY**.

PLEADING.—*Dilatory plea—Affidavit.*—In crown cases a dilatory plea must be verified by affidavit; such affidavit must be positive, or show some probable cause to induce the court to believe the facts stated in the plea. 6 Anne, c. 10, s. 11, applies to criminal cases. A dilatory plea will not be set aside on the ground of its not being filed in time, without an affidavit to that effect. *Reg. v. Duffy*, 9 Ir. L. R. 163.

POOR RATE. See **RATING**, 2, 3, 4.

PRACTICE.—*Application for new trial.*—The rule requiring a party to apply within the first four days of term for a new trial, applies equally to criminal as civil cases; but if the court, upon looking into the notes of the trial, think there is a question to be raised, they will direct it to be argued. *Reg. v. Birch*, 9 Ir. L. R. 157.

And see **CERTIORARI**, 1, 2, 3. **CONSPIRACY**. **EXCISE**, 2.

PRISONER. See **REMOVAL**, 13.

PUBLICATION OF RATE. See **RATING**, 3.

RATING.—1. *Church rate—Enforcing payment—Jurisdiction of justices.*—By stat. 53 Geo. 3, c. 127, s. 7, if any person refuse payment of a church rate, the validity of which has not been questioned in any ecclesiastical court, he may be brought before two justices, who may examine upon oath into the merits of the complaint,

and order payment, &c. ; but if the validity of the rate be disputed and notice thereof given to the justices by the person disputing it, they shall forbear giving judgment in the case. Where a person summoned before the justices under this act, gave notice that he should not contest the validity of the rate in an ecclesiastical court, but commence actions in the court of common law against them: all persons concerned therein, for all acts connected with the rates, which he should be advised were illegal: Held, that this was sufficient notice. The jurisdiction of the justices depends on the bonâ fide intention of the persons summoned to dispute the rate, and that is a matter for them to ascertain. *Dale v. Pollard*, 2 New S. C. 681.

2. *Poor rate—Brickfields.*—Where land containing brick earth is let for the purpose of making bricks, the lessee paying the lessor a certain sum per acre for the land, and also a royalty on a fixed sum per thousand for all the bricks made, the proper criterion for the sessions for estimating the rateable value of such lands is, (taking into consideration the purposes to which such land is to be applied, and the privileges which a tenant would enjoy by reason of his occupation,) the sum which a tenant from year to year may reasonably be expected to give, after making the deductions specified in the 6 & 7 Will. 4, c. 96. The royalty is to be considered in the nature of rent, and must be taken into account in estimating the amount which a tenant would give. *Reg. v. Westbrook*, *Reg. v. Everett*. 2 New S. C. 599.

3. *Poor rate—Publication.*—In the township of T., where was an ancient chapel, a new church was built and consecrated in 1832, since which period divine service has regularly been performed on Sundays in the new church, though parish meetings continue to be holden in the chapel, where christenings and burials are also occasionally performed: Held, that the new church being the church *de facto* of the place, it is a sufficient publication of a poor rate if the notice required by the 1 Vict. c. 45, be affixed at or near the door thereof, and not at that of the chapel. In the same place a room was hired for a school-house, in which divine service was regularly celebrated on Sundays according to the rites of the Church of England: Held, that it was not necessary to affix any notice on the door of the school. Held, also, that it is a sufficient publication, under the 1 Vict. c. 45, if the notice be affixed to the principal door only of the church. *Ormerod v. Chadwick*, 2 New S. C. 697.

4. *Poor rate—Warrant of distress.*—A warrant of distress for poor rates was objected to for reciting that the rate was made on the 25th of November instead of the 24th of September, the former being in fact the date of its allowance: and also for alleging that the refusal of the plaintiffs to pay the rate in question had been "duly proved," instead of "proved on oath:" Held, that the warrant was good. *S. C. ib.*

And see HIGHWAYS, 3.

RECOMMITMENT. See CERTIORARI, 3.

REGISTER. See APPRENTICESHIP, 2.

RELIEF. See REMOVAL, 9, 10, 11, 14.

REMOVAL.—1. *Appeal, notice of—Adjourned sessions for different divisions of county.*—Where quarter sessions are regularly held on certain fixed days, at certain places, in different divisions of a county, and each by adjournment from the preceding, the fourteen days notice required by the 4 & 5 Will. 4, c. 76, s. 81, of an appeal to be tried in any one of the divisions, should be reckoned with reference to the first day of the sessions held in the first of such divisions, though the practice of the sessions be to try all appeals in the division in which the respondent parish is situate. *Reg. v. The Justices of Suffolk*, 2 New S. C. 554.

2. *Appeal, notice of—Amendment—Abandonment—Reviewing decision of sessions.*—Notices to enter and try an appeal were served by appellants; afterwards, on the same day, one of the notices was recalled by a clerk to the appellant's attorney, and by him altered by striking out the word "enter," (as the appeal had been already entered at a previous session,) and by adding a notice that the former notice was abandoned. This second notice was then re-served without being re-signed by the parish officers of the appellant parish. At the trial these facts were proved, but the appellants were unable to prove that the second notice was served in due time, in consequence of the absence of the clerk who served it, whereupon the sessions dismissed the appeal "because the notice was not sufficiently proved." Held, that the appellant's attorney was justified in having an informal notice amended after it had been signed; that the word "enter" in the original notice did not make it bad; but that the second notice, though insufficient as a notice of appeal, for want of proof as to time of service, was good as an abandonment of first notice, and that the sessions had come to a right decision. *Quære*, whether this court will review a decision of the sessions on a preliminary question of fact. *Reg. v. The Justices of Somersetshire*, 2 New S. C. 645.

3. *Appeal—Option of appealing after service of order or removal of pauper.*—An appellant parish has the option of appealing to the next practicable sessions, either after the service of the order of removal, with the other documents required by the 4 & 5 Will. 4, c. 76, s. 79, or after the actual removal of the pauper. *Reg. v. The Overseers of Leeds*, 2 New S. C. 595.

4. *Appeal—Parish and township—Question of fact, whether township maintained its own poor—Decision of sessions final.*—The township of K. is situate within the parish of K., and an order of removal on a settlement stated to have been gained in the township was directed to the churchwardens and overseers of the parish of K. Against this a notice of appeal was sent by the overseers of the township of K. At the trial a preliminary objection was taken, that the churchwardens of the parish ought to have joined with the overseers in the notice of appeal, whereupon a witness was called, who stated that the township maintained its own poor exclusively of the parish;

the sessions, however, not believing that evidence, held the object fatal, and dismissed the appeal: Held, that as the sessions had decided on a question of fact, their decision was final, and a mandamus to hear the appeal was refused. *Reg. v. The Justices of Flintshire*, 2 New S. C. 572.

5. *Appeal—Within what time—Second removal under new order.*—Order of removal from M. to D. of a man, his wife and children, was served on the 27th March, and the man alone removed under it on the 22nd April; the man having returned to M., was on the 23rd of December, removed with his wife and family to D under the same order: Held, that an appeal by D. to the January sessions was too late. *Reg. v. The Justices of Durham*, 2 New S. C. 665.

6. *Evidence of settlement—Former order quashed—Conclusive—Entry at sessions—Evidence in explanation.*—On the trial of an appeal against an order of removal, it appeared that a former order had been quashed on appeal between the same parishes, and relating to the same paupers, and an entry of it in the minute book of the previous sessions was as follows: "Order quashed, without any special entry, as the court has no evidence before them to enable them to make such entry." The sessions, after hearing evidence explanatory of the circumstances under which this entry had been made, decided that it was not conclusive as to the settlement of the paupers: Held, that the sessions were right in so doing. *Reg. v. The Inhabitants of Landkey*, 2 New S. C. 623.

7. *Same.*—On the trial of an appeal against an order of removal it appeared, by an entry in the minute book, that a former order of removal was quashed on the ground that the examinations were insufficient to support the order: Held, that parol evidence was admissible to explain this entry, and to show that the order was not quashed on the merits. *Reg. v. The Inhabitants of Widecombe in the Moor*, 2 New S. C. 539.

8. *Same.*—An entry by the quarter sessions that an order was quashed not upon the merits, without prejudice to the making of any other order, &c., prevents it from operating as an estoppel between the parishes, and is conclusive that the question of settlement was not adjudicated upon; and therefore, on the hearing of an appeal against a subsequent order respecting the same settlement, it is not competent for the appellants to adduce evidence to show, notwithstanding such entry, that the former order was in fact quashed on the merits. *Reg. v. The Inhabitants of St. Anne, Westminster, (In re Wood)*, 2 New S. C. 525.

9. *Evidence of settlement—Relief—Statement of relieving officer of union no evidence against parish.*—A statement by the relieving officer of a union that he gave relief to a pauper whilst resident in the parish of M. and charged it in his account to the parish of W., both parishes being in the same union, is no evidence of relief given by the parish of W. from which to infer a settlement. *Reg. v. The Inhabitants of Little Marlow*, 2 New S. C. 576.

10. *Evidence of settlement—Relief by guardians.*—A pauper while residing in parish A. was relieved on account of parish B. by a relieving officer of a union in which parish B. is situate, by order to that effect of the board of guardians of that union: Held, that such relief afforded evidence from which the sessions might infer that the pauper was settled in parish B. *Reg. v. The Inhabitants of Crondall*, 2 New S. C. 667.

11. *Examinations—Emancipation—Relief.*—An order for the removal of a pauper from B. to L. was made upon examinations which stated that he had never gained a settlement in his own right; that he married in 1812, then being twenty years old; that his father was married a second time in 1824, soon after which the father received relief from L., while residing out of that parish, and continued to do so till his death; and that the pauper's grandfather had lived and died in L.: Held, that the examinations were insufficient to prove a derivative settlement of the pauper in L., as it did not appear from them that the relief given to his father had reference to a settlement gained by him previous to the pauper's emancipation by marriage in 1812. *Reg. v. The Inhabitants of Bangor*, 2 New S. C. 627.

12. *Examinations—Identity—How objection raised in grounds of appeal—Decision of sessions final.*—In the examination for the removal of a pauper from L. to C., M. S. stated that she was the widow of A. S., who was settled, as she had heard, in C., and J. S. stated that he was the brother of A. S., who was born in C.; C. appealed, and in their grounds of appeal alleged, that the order, notice of chargeability and the examinations were respectively defective and bad on the face thereof; and that the examinations contained no sufficient legal evidence of the pauper being settled in C., or having come to settle in or being chargeable to L.: Held, that the sessions had a right to allow the appellants on this ground to raise the objection that there was not a statement of the identity of A. S. mentioned in the first examination with A. S. in the second; and that their decision was final. *Reg. v. The Justices of Staffordshire*, 2 New S. C. 557.

13. *Examination of prisoner*—59 Geo. 3, c. 12, s. 28.—In order to make the examination of a prisoner, taken as to his settlement, under the 59 Geo. 3, c. 12, s. 28, admissible in evidence, it must be proved that he still continues a prisoner. *Reg. v. The Inhabitants of Widecombe in the Moor*, 2 New S. C. 539.

14. *Examination—Relief.*—Held also, that the sessions were right in holding that a statement in the examination that the pauper received relief from Hartpury aforesaid, "sufficiently showed that she had received relief from the parish officers of Hartpury on account of the parish." *Reg. v. The Inhabitants of Hartpury*, 2 New S. C. 648.

15. *Examination—What to be sent to appellants.*—Where a pauper was examined before justices in February, and again in March, on which last occasion an order of removal was made; a copy of the statement made by the pauper on the first occasion not

being properly executed, and not being an examination on which the order was made, need not be sent by the respondents under the 4 & 5 Will. 4, c. 76, s. 79. *Reg. v. The Inhabitants of Crondall*, 2 New S. C. 667.

16. *Grounds of appeal, general denial of—Settlement after special ground.*—The examination stated two modes of settlement in the appellant parish, 1. By birth; 2. By hiring and service. The grounds of appeal were as follows: 1. That a former order of removal, relating to the same settlement, had been quashed; 2 and 3. Stating the removal of the parents of the pauper's husband to a third parish under orders unappealed against; 4. Relief given by that third parish; 5. Denying the settlement by hiring and service; 6. That the said paupers were not settled in the appellant parish in any manner whatever: Held, that, under these grounds of appeal, it was not competent to the appellants to prove that the birthplace of the pauper's husband was not in their parish.—*Reg. v. The Inhabitants of Widecombe in the Moor*, 2 New S. C. 539.

17. *Ground of appeal—No copy of order sent—Inaccurate copy.*—Under the general objection "that no copy or counterpart of the order of removal has been sent by post or otherwise," it is not competent for the appellants to object that the copy sent by the respondents is inaccurate, some few words being omitted. *R. v. St. Anne, Westminster (Re Jones)*, 2 New S. C. 517.

And see APPRENTICESHIP. RENTING TENEMENT.

RENTING TENEMENT. — *Settlement by—Keep of cow—Pasture fed—Contract—Evidence.*—On the trial of an appeal against an order, founded on a settlement by renting the keep of a cow, the evidence was that in the year 1811 the cow was hired of B. by D. and was kept in the pasture season on the pasture lands of B.'s farm; that D. put the cow where there was feed for her, but nothing was said either by B. or D. as to the manner or in what particular lands the cow was to be fed: Held, that this was not sufficient evidence from which the sessions might infer a contract that the cow should be pasture fed, and consequently that no settlement was gained by it under the 13 & 14 Car. 2, c. 12. *Reg. v. The Inhabitants of Mendham*, 2 New S. C. 560.

SENTENCE. See CONSPIRACY.

SETTLEMENT. See APPRENTICESHIP, 1, 2. HIRING AND SERVICE. REMOVAL, 6—14. RENTING TENEMENT.

SPECIAL CASE. See CERTIORARI, 1, 2. EXCISE, 2.

SUMMARY CONVICTION. See MANDAMUS, 1.

SURVEYOR. See HIGHWAYS, 1, 2.

WARRANT OF DISTRESS. See RATING, 4.

EQUITY.

CONTAINING CASES IN

9 Beavan, part 1.	1 Beatty, parts 3 and 4.
2 Phillips, part 2.	2 Jones & La Touche, part 3.
9 Ir. Eq. R. parts 3, 4 and 5.	

ACCOUNT.—1. *Agent and principal.*—An account decreed against a land agent for twenty-seven years previous to the filing of the bill under the circumstances, but refused as to certain gratuities received from tenants by the agent with the knowledge of his principal, which were charged to be extortionate, but by the exorbitance of which the principal was not proved to have been a loser, except so far as they were taken as fines. *Palmer v. Browne*, Beat. 540.

2. *Pleading—Infant—Misjoinder.*—A., on behalf of herself and her infant children, filed a bill against B., who was tenant in common with her husband C., alleging that on his death B. entered into receipt of the entire rents, claiming the whole, and kept possession of the title deeds, for want of which the plaintiffs could not proceed at law; and praying that they might be put in possession of C.'s moiety, and an account of the rents of it since his death, and for the title deeds. A. did not make affidavit that the deeds were not in her possession: Held, that such affidavit is not necessary in a case where the plaintiffs have a right to sue in equity aliunde, and that a demurrer for want of it was bad in substance; that the demurrer not stating specifically the parts of the statement or relief to which it applied, was bad in form; that though the bill could not be sustained for an account between tenants in common, yet that the infant plaintiffs were entitled to such account against the defendant; and that the mother being co-plaintiff was no misjoinder. *McCarthy v. Hatch*, 9 Ir. Eq. R. 206.

And see **TENANT IN COMMON.**

ACTION. See **TITHES.**

ADMIRALTY. See **SHIP.**

ADMINISTRATION. See **EXECUTOR AND ADMINISTRATOR.**
PLEADING, 1.

ADMISSION OF ASSETS. See **EXECUTOR AND ADMINISTRATOR, 2, 3.**

ADMISSION OF TITLE. See **RECEIVER, 5.**

AFFIDAVIT. See **FORMA PAUPERIS. SOLICITOR, 3.**

AGENT. See ACCOUNT, 1. **PRINCIPAL AND AGENT.** VENDOR AND PURCHASER, 1.

AGREEMENT. See TRUST, 1, 2.

AMENDMENT.—1. *Answer outstanding—Irregularity—General orders—Practice.*—A plaintiff, having one of the defendants under his control, kept back his answer. Another defendant put in his answer, and after great delay on the part of the plaintiff, moved to dismiss for want of prosecution. The plaintiff, to defeat the motion, obtained an order of course to amend: Held, that as there was an answer outstanding, the order to amend could not be considered irregular; but it was afterwards discharged on other grounds. See next case. *Forman v. Gray*, 9 Beav. 196.

2. *Same.*—An order of course to amend, obtained while an answer is outstanding, is not irregular, though under the circumstances it may have been improperly obtained. *Arnold v. Arnold*, 9 Beav. 286.

3. *Last answer—General orders—Practice.*—An order of course, though obtained within the time limited by the general orders, discharged on the ground of the inexcusable delay of the plaintiff in proceeding and getting in the answer of a defendant under her control, and because it had been obtained for the purpose of defeating a motion to dismiss for want of prosecution. The expressions "last answer," and "the last of several answers," in the general orders regulating the period within which a plaintiff may obtain an order of course to amend, mean the last answer required in the then state of the record. *Forman v. Gray*, 9 Beav. 200.

4. *Order to amend obtained after replication—General orders—Practice.*—An order of course to amend, by adding parties, obtained after replication, is irregular. *Hitchcock v. Jaques*, 9 Beav. 192.

5. *Order to amend without prejudice.*—Plaintiff will not be allowed to amend the bill, putting in issue puisne incumbrances, and making the incumbrancers parties, without prejudice to an order to take the bill pro confesso, obtained against the principal defendant. *O'Callaghan v. Blake*, 9 Ir. Eq. R. 220.

6. *Order to amend without prejudice to injunction—General orders—Practice.*—A special order to amend, without prejudice to an injunction, must be made to the court and not to the master. *Wright v. King*, 9 Beav. 161.

7. *Prayer of bill—Practice.*—Liberty given, on motion after a cause has been heard and reheard, to amend the prayer of the bill by praying the benefit of proceedings stated in it, when there was a satisfactory reason for its not having been asked at the hearing, the defendant being allowed to answer anew. *Blake v. Foster*, Beav. 464.

And see DISMISSAL, 3, 4. PRACTICE, 6. PRODUCTION OF DOCUMENTS, 1.

ANNUITY.—1. *Deed—Impeachment—Waiver.*—Where a son, who had joined his father in granting an annuity, which was assigned to the defendant, allowed and encouraged the latter to insure the life

for which it was granted: Held, he could not afterwards impeach the annuity as obtained under an undue exercise of parental authority. *Rogers v. Bruce*, Beat. 486.

2. *Policy of insurance*.—A., a tenant for life, granted an annuity to B. for B.'s life, in consideration of 500*l.*, and a policy of insurance on A.'s life was assigned absolutely to B. in order the more effectually to secure the payment of the annuity and the repayment of the 500*l.*; and it was agreed that as soon as A. should give unexceptionable security for the annuity it should be decreased by amount of the annual premium of the policy, which was to be paid by B. out of the annuity until such security should be given. No other security was given for the annuity and the premiums were paid by B. until her death: Held, that the representatives of B. were entitled to the policy although several annual premiums had been paid by A. after the death of B. *Kavanagh v. Waldron*, 9 Ir. Eq. R. 279.

3. *Rent charge—Bill in equity—Jurisdiction*.—A bill in equity does not lie to recover a rent charge, for which there is a legal remedy, merely because of the difficulty of proceeding at law; the rule being that a party must abide by the legal remedy his deed provides for him unless that is defeated by fraud, or rendered insufficient by some contingency. *Cupid v. Jackson*, 13 Pri., and other cases on this subject observed on. Where an annuity deed contained a covenant to pay a rent charge, and for a further assurance of it, and the grantor becoming insolvent, questions arose as to the applicability of rents received by his assignees to discharge arrears, and a judgment and execution was had for some past gales on which questions of satisfaction were raised, and the assignees submitted to the appointment of a receiver in a suit founded on the deed, who brought a fund into court: Held, that these circumstances gave jurisdiction to entertain the suit. The annuity was collaterally secured by a judgment, and breaches were suggested, and executions issued for some gales, and new bonds and judgments taken for other gales: *Semble*, these gales were satisfied and extinguished though these proceedings were unproductive. *Roberts v. Hughes*, Beat. 417.

And see APPOINTMENT. LIMITATIONS, STATUTE OF.

ANSWER. See INFANT, 1. PRACTICE, 1.

APPEAL. See EX PARTE ORDERS. PATENT.

APPEARANCE.—*By counsel*.—On the hearing of an appeal presented by a defendant, the court having intimated that a question included in it, relating to costs, could not be gone into in the absence of co-defendants who had not been served, counsel were, in the course of the argument, instructed to appear for them gratis. But the Lord Chancellor refused to sanction such an appearance, and disposed of the case as if they had not appeared. *Att. Gen. v. Gibbs*, 2 P. 327.

APPOINTMENT. See PORTIONS, 1, 3. POWER, 1, 2.

APPORTIONMENT.—*Annuities*.—Gift of an annuity of 300*l.* to the testator's three daughters and the survivors and survivor,

with a gift over to the last survivor of the sum set apart to answer the annuity. After the death of one of the daughters the fund so apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, becoming available: Held (reversing the original decision) that as the last survivor had had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit after her sister's death until her own, and, therefore, that she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund. *Innes v. Mitchell*, 2 P. 346.

ARBITRATION.—*Setting aside award.*—Upon the face of an award the arbitrator appeared to have improperly disallowed a sum of 818*l*. On an application to a court of equity to set aside the award the respondent offered to allow it: Held, nevertheless, that the award must be set aside. *Skipworth v. Skipworth*, 9 Beav. 136.

ASSETS. See LEGACY.

ASSIGNMENT. See JUDGMENT.

ATTORNEY GENERAL. See COSTS, 2. INFANT, 1.

BARRISTER.—*Bond for fees.*—A bond given to a barrister for past and future professional services, though the taking of it is to be condemned, will not be relieved against on grounds of public policy. Such a security decreed to stand as a voluntary bond in the administration of the obligor's assets.—*Leslie v. Verschoyle*, Beat. 535.

BILL OF DISCOVERY. See COSTS, 3. SOLICITOR, 11.

BILL OF EXCHANGE. — *Accommodation Bill.* — *Bankruptcy.*—A bill of exchange is not to be treated as an accommodation bill if there be any effects of the drawer in the hands of the acceptor, no matter what the amount or in whose favour the balance may be. *Ex parte Williams*, Beat. 477.

BISHOP'S LEASE. See LESSOR AND LESSEE, 3, 7.

BOND. See BARRISTER. **BOTTOMRY.** **RAILWAY COMPANY.**

BOTTOMRY BOND.—1. *Fraud, where alleged by bill, but disproved, no secondary relief.*—*Inquiry directed at request of defendant.*—If a bill makes a case of actual fraud, and at the hearing the fraud is disproved, or not established, the court will not in general allow the bill to be used for any secondary or inferior kind of relief to which the plaintiff might otherwise have been entitled, but will dismiss it at once. But where a bill sought to set aside a bottomry bond, as having been concocted in a fraudulent conspiracy between the captain of the ship and the obligee, though the fraud was disproved at the hearing, the court, at the request of the defendant, directed the usual inquiries for the purpose of ascertaining how much of the sum secured by the bond was a proper subject of bottomry. *Semble*, a bottomry bond given by the captain of a ship at a foreign port is not necessarily void because there was time during the ship's

stay at such port for the captain to have written home to his employers and to have received an answer; but, at all events, if the omission of the captain, under such circumstances, to communicate with his employers is intended to be relied on as invalidating the bond, it ought to be specifically charged in the bill, otherwise, although it appear in evidence, it will not be regarded. *Glascott v. Lang*, 2 P. 310.

2. *Mortgage—Charter party—Set-off.*—The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such sum as should be necessary to equip the ship for the homeward voyage, and a bottomry bond was accordingly executed, but the amount of the necessary expenses of outfit turned out greater than that for which the bond was given: Held, that, as against the mortgagee, he was not entitled to set off the excess against the sum which became due under the charter-party. *S. C.* 2 P. 325.

BREACH OF TRUST. See PLEADING, 2. TRUST, 1, 2.

BYGONE RENTS. See RECEIVER, 2.

CHARGE ON REALTY. See WILL, 2.

CHARITY.—1. *Charitable bequest—Validity—Scheme.*—A direction to trustees to spend at their discretion, “in the service of my Lord and Master and I trust Redeemer,” 2000*l.* annually, till the testator’s son attained his age: Held a good charitable bequest. From the temporary character of the bequest, and the discretion intended to be given to the trustees, the court declined to refer it to the master to approve of a scheme. *Powerscourt v. Powerscourt*, Beat. 572.

2. *Charitable use—Crown—Information.*—An allegation of a grant in the reign of Edward III. in Ireland, for the improvement of a city and support of public buildings, bridges, highways and establishments therein: Held to be a sufficient statement of a charitable use, and one which, though made to a civil corporation, will be enforced in this court as a trust. Such a gift from the crown is sufficient to create a condition; and the crown must insist on the forfeiture, or waive it on performance of the condition, so as to give this court jurisdiction on the information. An information against a corporation, and also against an individual officer of it, making a case in which the latter would be personally liable, is not demurrable. *Attorney General v. The Corporation of Limerick*, Beat. 563.

3. *Vacancies in corporation trustees.*—The court will not make an order for filling up vacancies in charity trustees, under the Municipal Corporation Act, unless it be satisfied that the existing number is practically insufficient, and that inconvenience arises from not having more. *In re Worcester Charities*, 2 P. 284.

And see TRUST, 4, 7.

CHILDREN. See CONVEYANCE, 1, 2. PORTIONS. WILL, 5, 6, 7.

COLLATERAL RELATIONS. See LUNACY, 1.

COMMISSION. See SALE UNDER COURT, 1.

COMMISSIONERS. See RIVER.

CONDITIONAL PURCHASE. See MORTGAGE, 2.

CONSERVANCY. See RIVER.

CONSIDERATION. See MARRIAGE.

CONSTRUCTION. See CONVEYANCE. DEED. WILL.

CONTEMPT.—1. *Delay—Excuse for—Practice.*—After a petition had stood over at the request of the respondent's counsel for his convenience, the petitioner incurred a contempt, which he had not cleared when the petition came on again: Held, that he was nevertheless entitled to be heard. *Bristowe v. Needham*, 2 P. 19.

2. *Illness of Defendant—Practice.*—Proceedings of contempt for want of answer stayed, on proof of the defendant's inability by reason of illness to put in his answer. *Hicks v. Lord Alvanley*, 9 B. 163.

CONTRACT. See TRUST, 4. VENDOR AND PURCHASER, 1.

CONTRIBUTION.—*Debts—Imperfect will.*—A testator by an imperfect passage referred to a trust deed for payment of his debts: and his desire that said deed, notwithstanding his death before payment of all his debts, out of the produce of his estates, should contribute rateably to the payment of his debts in proportion to the annual profits now arising from each part respectively, and confirmed the deed, and charged all his estates with the debts then or which should thereafter be due by him, and, subject to said debts in manner aforesaid, gave the estates to different devisees. He subsequently executed a mortgage for the same purposes as the trust deed, and after that republished his will by a codicil, giving the estates to the same uses, intents and purposes mentioned in his will: Held, that the estates should contribute in proportion to the annual profits at the date of the will, and not in proportion to their value at the testator's death. *O'Dell v. Harte*, Beat. 449.

And see CREDITOR'S SUIT. LESSOR AND LESSEE, 3.

CONVEYANCE.—1. *Construction of—Vested interest—Will.*—S., entitled to a lease for lives, by lease and release of the 5th of March, 1833, in consideration of love and affection for his eldest son, J., and in order to advance him in life, and to entitle him to a wife and fortune, now in contemplation, conveyed the lands to J. and his heirs. This deed was executed by S. and J., and was registered by S. nine months afterwards, but S. retained it in his possession, and with the assent of the son continued to his death to act as the owner of the lands. S., by his will, devised all such real freehold and personal property of which he should die seised or possessed to J., "in case he shall recover from his present illness," and appointed E. his residuary legatee. There was no particular marriage in contemplation when the conveyance of 1833 was executed. J. survived the testator, and afterwards died of the illness with which he was

afflicted when the testator made his will: Held, 1, that the conveyance of 1833 was not conditional, executed for a specific purpose which had not been performed, and that on its execution the legal estate was vested in J; 2, that the estate was not divested by the son not afterwards marrying; 3, that the circumstances of the case did not establish a trust for S. *Semble*, that the true construction of the devise to J. is, that it is a gift to him in case he did not die from his then present illness in the lifetime of the testator. *Alleyne v. Alleyne*, 2 J. & L. 544.

2. *Defect—Illegitimate child.*—Defect in a legal conveyance not supplied in favour of a natural child. *Blake v. Blake*, Beat. 575.

3. *Fraud—Relief against—Time.*—In a suit to set aside a conveyance for fraud, after sixteen years, relief given against the purchaser not extended to his minor child claiming an equity under articles executed before the bill was filed. *Farrell v. Kelly*, Beat. 492.

4. *Petition—Omission in decree.*—A direction for the master to settle a conveyance, omitted in a decree, was supplied by petition. A secret purchase by an agent from his principal was set aside. By the decree possession was directed to be given, and a conveyance to be executed. Accounts were also directed to be taken of the rents and purchase money, and the balance was directed to be paid, but no lien given: Held, that the conveyance must at once be made without waiting for the result of the accounts. *Trevelyan v. Charter*, 9 B. 140.

COPY BILL.—*Substituted service—General Orders—Practice.*—Whether the court can order substituted service of a copy bill under the 23rd Order of August, 1841, *quære*. *Thomas v. Selby*, 9 B. 194.

CORPORATION. See CHARITY, 2, 3. TRUST, 4, 7.

COSTS.—1. *Appearance—Answer.*—The costs "occasioned thereby," in the 18th General Order of 1843, are the costs occasioned by the defendant entering an appearance in the common form, and not merely the costs occasioned by his answer. *Peyton v. Browne*, 2 J. & L. 560.

2. *Attorney-general.*—The attorney-general made a party to a cause, as representing a charge belonging to a deceased bastard, is not entitled to costs if nothing is reported to be due on the charge. *Murphy v. Osborne*, 9 Ir. Eq. R. 254.

3. *Bill of discovery—12th Order of May, 1845.*—A bill of discovery is not within the 12th Order of May, 1845, unless it be a cross bill in aid of a defence to an original bill. *Heming v. Dingwall*, 2 P. 212.

4. *Order for rehearing discharged—Practice.*—An order for rehearing was discharged with costs, but in the meantime the cause had been set down and briefs delivered: Held, that the costs thereof could not be included in the order, and could only be given on a rehearing or upon special application. *Davenport v. Stafford*, 9 B. 106.

5. *Revivor.*—A judgment creditor's bill was filed in 1829, the
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answers were filed in 1830, but no further steps were taken in the cause until 1843, when leave to file an original bill in the nature of a bill of revivor was obtained, under the 58th rule, the plaintiff having accounted for the delay between 1830 and 1839. The court gave him no more costs than he would have been entitled to if the original bill had been filed in 1843, but gave him interest. *Fairclough v. Ackland*, 9 Ir. Eq. R. 251.

And see CREDITORS' SUIT. DISMISSAL, 2, 3, 4, 5. EXECUTOR AND ADMINISTRATOR, 4. FINE. ISSUE. MARRIAGE SETTLEMENT. MORTGAGE, 1. PATENT. RECEIVER, 3, 4. SOLICITOR, 1—10. STAYING PROCEEDINGS.

COUNSEL. See APPEARANCE. BARRISTER. SOLICITOR, 1, 2, 3.

CREDITORS' SUIT.—*Contribution to costs—Lien—Practice.*—The usual direction in decrees in creditors' suits that the creditors shall, before they are admitted, contribute their proportion to the expenses of the suit, does not prevent the court, on further directions, if the case warrant, from ordering the plaintiff to pay all the costs of the suit; but if the suit be anything more than a mere creditors' suit the direction for contribution ought to be limited to the costs of that part of the suit in which all the creditors have a common interest with the plaintiffs. *Dunning v. Hards*, 2 P. 294.

And see REHEARING.

CROSS BILL. See PRACTICE, 2.

CROWN. See CHARITY, 2.

DEBT. See CONTRIBUTION. EXECUTOR AND ADMINISTRATOR, 6.

DEED.—1. *Construction of.*—E., being entitled to an annuity of 480*l.* issuing out of the lands of X., of which her son A. was seised in fee, upon her marriage in 1801 with W. executed a settlement, whereby, after reciting that the clear annual rents of X. did not upon an average exceed the sum of 240*l.*, and were therefore insufficient to answer the accruing payments of the annuity, she assigned the annuity and all arrears and future payments thereof to trustees, upon trust that if A. should attain the age of twenty-one, the trustees should thenceforth during the joint lives of E. and A. thereout pay him a certain annuity, with a proviso for its lessening or abatement in case A. should become entitled to an annual income of equal or lesser amount, and subject thereto to receive so much and such part of the annuity of 480*l.* as the clear yearly rents of X. should from time to time be sufficient to pay, and pay the same to W., and to E. after the death of W., and to stand possessed of the arrears then due and thereafter to become due, if any, in consequence of the rents of X. being insufficient to answer the same; upon trust that if A. should attain twenty-one or marry and survive E. to release the lands from the arrears due at the time of the settlement or thereafter to become due; and if A. should either die in the life of E. or should

survive E. and die under twenty-one, and without having been married, to stand possessed of the arrears upon such trusts as E. should appoint, and in default of appointment to call in and enforce payment thereof, and invest the same, and pay the interest thereof, to E. for life, then to W. for his life, and then the principal to the children of E. and W. equally. And it was declared that in the meantime and until under the trusts the arrears should either become absolutely vested in A. or become absolutely subject to the appointment of E., the trustees should forbear from requiring or enforcing payment of the arrears. A. attained the age of twenty-one years. W. died. Afterwards the rents of X. amounted to more than 480*l.* per annum: Held, E. and A. being both living, that the surplus rents, after paying the accruing gales of the annuity, were properly applicable to the payment of the arrears which accrued since the settlement of 1807. *Battersby v. Rockfort*, 2 J. & L. 431.

2. *Escrow*.—A deed, the possession of which was not delivered, held complete, and not merely an escrow, when it was complete on the face of it, and the memorial was duly registered treating it as executed at the time of its date, and the non-delivery accounted for by delay respecting a mortgage which was part of the consideration. *Blennerhasset v. Day*, Beat. 468.

3. *Registry act*—*Provisional assignee*.—A. being entitled to lands in Ireland was discharged in England as an insolvent debtor, under the 1 Geo. 4. c. 119. The assignment of all his estate and effects to the provisional assignee was filed in the Insolvent Court, but was not registered. The subassignment to the general assignees was registered. Afterwards A. by deed duly registered conveyed his Irish estates in mortgage to B., who had no notice of the insolvency. The title of the mortgagee is to be preferred to that of the assignees of the insolvent. *Battersby v. Rockfort*, 2 J. & L. 431.

And see ANNUITY. CONVEYANCE.

DEFAULT. See EXECUTOR AND ADMINISTRATOR, 1. RECEIVER.

DEFENDANT. See WITNESS, 1, 2.

DEMURRER.—*Ore tenus*—*Special or general*.—A demurrer ore tenus cannot be more extensive than the demurrer on the record. The uncertainty of a statement is ground of special demurrer, and cannot be relied on upon a general demurrer. *M'Carthy v. Hatch*, 9 Ir. Eq. R. 206.

And see HUSBAND AND WIFE. LIMITATIONS, STATUTE OF. PLEADING. RIVER.

DEPOSITIONS. See WITNESS.

DISCOVERY. See COSTS, 3. PRODUCTION OF DOCUMENTS. SOLICITOR, 11.

DISMISSAL OF BILL.—1. *For want of prosecution*—*Excuse of delay*.—Under the General Orders, any defendant is entitled to move to dismiss for want of prosecution, after the expiration of six

weeks from the time when his answer is to be deemed sufficient. Upon such a motion, all unavoidable and all just and reasonable causes of delay may be considered, and in the cautious exercise of its discretion, the court may grant or refuse to grant any further time the plaintiff may require. *Forman v. Gray*, 9 B. 200.

2. *For want, &c.*—*Filing replication*—*Practice*.—On a motion to dismiss for want of prosecution, the plaintiff undertook to file a replication. The case stood over to enable him to perform his undertaking, and having so done, he was ordered to pay the costs of the motion. *Young v. Quincey*, 9 B. 160.

3. *For want, &c.*—*General Orders*—*Order to amend*—*Costs*.—Under the orders of May 1845, in a case where there are several defendants, any one of them may move to dismiss for want of prosecution at the expiration of four weeks after his answer is sufficient, if the plaintiff has since taken no step, and that although his co-defendants may not have put in their answer; but an order to amend, obtained and served after the notice of motion and before its hearing, is, under ordinary circumstances, an answer to the motion to dismiss, but the plaintiff, having by such means interrupted the defendant's right, must pay the costs of the motion. *Lester v. Archdale*, 9 B. 156.

4. *Same*.—Where plaintiff amended his bill *bonâ fide* after the defendant was entitled to move to dismiss it, the court refused to dismiss the bill, but made the plaintiff pay the costs of the motion. *Moore v. Lalor*, 9 Ir. Eq. R. 148.

5. *For want, &c.*—*Security for costs*.—It is no answer to a motion to dismiss the bill for want of prosecution by one defendant, that another defendant has obtained an order staying the plaintiff until he gives security for costs.—*Kelly v. Magee*, 9 Ir. Eq. R. 216.

And see *EX PARTE ORDERS*, 2.

DOCKETING ACTS. See *MORTGAGE*, 3.

DRAINAGE. See *LUNACY*, 1.

ECCLESIASTICAL RIGHTS.—*Non-residence*.—A non-resident clergyman cannot claim from the ecclesiastical commissioners the allowance under statute 3 & 4 Will. 4, c. 37, s. 20, for there being no glebe house or place of residence in the parish. *Ecclesiastical Commissioners v. Delmege*, 9 Ir. Eq. R. 117.

ELECTION.—1. *Articles—Will*.—By marriage articles the settlor agreed to settle lands specifically named, of which some were recited to be held in fee and for lives, and others to be leaseholds, on himself for life, with remainder to his first and other sons, &c. in strict settlement, that they should be charged with a jointure of 100*l.* a-year for his wife, and that 2000*l.*, his wife's fortune, should on his death be divided among his children, subject to his appointment. He afterwards acquired property and purchased other estates. By his will he devised "all his real and personal estates," subject to debts and legacies, to his eldest son for life, remainder to the first and other sons, &c., gave 100*l.* a-year to his wife in consideration of the join-

ture provided by the articles; bequeathed sums of money to his younger children, exceeding in amount 2000*l.*, with directions as to maintenance and accumulation, &c., and appointed his eldest son residuary legatee. Held, that the children should take the settled property under the articles, and the acquired property under the will, as there was no inconsistency to raise an election, and the latter was not to be deemed an execution of the former. *Knox v. Knox*, Beat. 501.

2. *Same*.—By the testator's marriage settlement 1000*l.* was secured of his property for his wife for life, with remainder to the issue of the marriage. The plaintiff was the only issue. By his will he gave the interest of 2000*l.* to his wife, expressly in addition to her claims under the settlement, and 5000*l.* to the plaintiff (without making any reference to the settlement) on her attaining twenty-one or marriage. Held, she could not claim both sums, but must elect between the settlement and will.—*O'Neil v. Hamill*, Beat. 618.

And see PORTIONS, 2.

EQUITABLE MORTGAGE. See MORTGAGE, 4.

ESCROW. See DEED, 2.

ESTATE TAIL. See WILL, 3.

EVIDENCE. See PERPETUATION OF TESTIMONY. WILL, 9.

EXAMINATION. See WITNESS.

EXCEPTIONS.—1. *Irregularity—General Orders*.—In a transition case under the orders of 1845, exceptions were filed one day too late; the court declined to order them to be taken off the file. *Whitmore v. Sloane*, 9 B. 1.

2. *Same*.—Exceptions for insufficiency were referred by the plaintiff to the master in rotation instead of to the master to whom there had been a previous reference. Pending the discussion on the irregularity in the master's office, the time limited for obtaining the report expired. The court, considering the error to have arisen from inadvertence, and not from wilfulness or perverseness, gave directions to the master to hear the exceptions. *Tuck v. Rayment*, 9 B. 38.

3. *Nunc pro tunc—General Orders—Practice*.—An order for leave to file exceptions in the form of nunc pro tunc will not now be made, even by consent; but a special order may be made for filing them, notwithstanding the time limited has expired. *Biddulph v. Lord Camoys*, 9 B. 155.

And see INJUNCTION.

EXECUTION. See POWER, 1, 2.

EXECUTOR AND ADMINISTRATOR.—1. *Administration suit—Pleading—Costs of evidence improperly taken—Distinction between wilful neglect and default, and improper expenditure of trust-money by executors*.—The right of an apothecary to charge for attendances is not matter of law but of contract, either express or to be implied from the usage of the place. Proof of improper expen-

diture of money by executors will not support a decree against them for an account on the footing of wilful neglect or default. A bill by residuary legatees prayed an account against the defendants, the executors, on the footing of wilful neglect and default, but made no case of misconduct against them, except that they had improperly defended an action in which they had failed, and the costs of which they claimed to retain out of the estate. The court, at the hearing, although of opinion that the action ought not to have been defended, gave the defendants their costs of the depositions which had been taken relative to that subject, on the ground that, having no connection with a case of wilful neglect and default, it was not a proper matter to be put in issue at that stage of the suit. *Smith v. Chambers*, 2 P. 221.

2. *Admission of assets—Arbitration.*—An executor filing a bill against agents of his testator, is liable for the balance and costs only to the amount of assets, the institution of the suit not being an admission of assets. A submission to arbitration by an executor is not per se an admission of assets. *Mocher v. Frazer*, Beat. 578.

3. *Admission of assets—Pleading.*—To a legatee's bill the executor admitted assets sufficient to pay the legacies, but relied on his right to retain them as an indemnity for the contingent liability on the testator's covenants, and did not set out the amount of the assets: Held, the answer was insufficient, and that the executor was bound to set out the amount of the assets. *M'Auley v. M'Auley*, 9 Ir. Eq. R. 142.

4. *Costs—Representative of insolvent executor.*—The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust. *Haldenby v. Spofforth*, 9 B. 195.

5. *Lien on assets, for services—Pleading—Demurrer.*—Plaintiff by his bill stated that J. G. and others, next of kin of R., agreed that he should have 300*l.* for his trouble and services in collecting evidence, &c. to establish their claim, which was disputed, and that they, and particularly J. G., promised he should have a lien for that sum on the assets; that, in consequence of his exertions, the parties were declared next of kin, and that J. G. and another of them, since deceased, took out administration. The bill prayed that the plaintiff might be decreed to have a lien on the assets: Held, on demurrer, that the claim, so far as it was a personal claim, was a demand for work and labour, and was recoverable, if at all, at law; that the promise by J. G. to give a lien on the assets before administration could not be enforced against the assets when J. G. and another afterwards administered; and, even if she alone had administered, such previous promise was by a stranger, and could be of no avail. *Quære*, would such promise be binding, even after administration? A demurrer for want of equity will lie to a cross bill. *Kirwan v. Gorman*, 9 Ir. Eq. R. 154.

6. *Pleading—Legatee—Debtor to estate of testator.*—A suit was instituted against A. and B., devisees of two encumbered estates, in which

a larger portion of the incumbrances was paid out of A.'s estate than it was properly liable to. The decree directed special accounts, which were prosecuted to a draft report, finding 13,000*l.* due to A. out of B.'s estate. A. made his will, and, reciting this draft report, bequeathed an interest in the 13,000*l.* to the plaintiffs, and more to his executor. The plaintiffs filed a bill against B. and those claiming through him, and against the executor of A., praying the benefit of the former decree, and to prosecute the special accounts and be paid their legacy: Held, that neither the specific nature of the legacy nor the character of the debt constituted any special case for taking the suit out of the common rule; that a debtor to the estate cannot be sued by a legatee; and the suit, being to carry out a former decree, did not remove but rather increased the objection. Neither the insolvency of the executor, if before his appointment as executor, nor his embarrassments, if removed before the commencement of the suit, nor the circumstance of the debtor's evading process, and its being difficult to recover from him, if the executor has not refused to sue him, are grounds to warrant a legatee in suing a debtor to the estate. *Wright v. Hamilton*, 9 Ir. Eq. R. 119.

And see TENANT IN COMMON.

EXHIBIT. See PRACTICE.

EX PARTE ORDERS.—1. *Appeal—Motion—Practice.*—The Lord Chancellor will not hear a motion by way of appeal from an ex parte order pronounced by another branch of the court. *Sturgeon v. Hooker*, 2 P. 289.

2. *Irregularity—Right of plaintiff to dismiss bill as of course after demurrer overruled—Practice.*—If a petition for an ex-parte order suppresses any fact which, whether really material or not, would, if communicated to the officer whose duty it is to draw up the order, prevent him from doing so without mentioning the matter to the court, the order will be discharged for irregularity. *Semble*, after a general demurrer to a bill has been overruled on argument, the plaintiff is not entitled as of course to an order dismissing his bill of costs. *Cooper v. Lewis*, 2 P. 178.

FEME COVERTE.—1. *Next friend—Forma pauperis.*—An application by a married woman, plaintiff, for leave to change her next friend, is in the discretion of the court, and will not be granted if there be reason to believe that the defendant's security for costs will be thereby prejudiced. Whether the court will stay proceedings on a suit by a married woman, on the ground that her next friend is not of ability to answer costs, *quære*. *Jones v. Fancett*, 2 P. 278.

2. *Payment out of court—No settlement—Practice.*—When payment out of court is asked of money belonging to a married woman, an affidavit that the fund is not settled is insufficient. It must be shown either that there is no settlement, or what the settlement was. *Britten v. Britten*, 9 B. 143.

FI. FA.—*General Orders of May, 1839—Second writ of fi. fa.*—Where a writ of fi. fa., issued under the General Orders of May,

1890, has failed to satisfy the demand, another writ may issue into another county. *Spencer v. Allen*, 2 P. 215.

FILING REPLICATION. See **DISMISSAL**, 2.

FINE AND NON-CLAIM.—*Fraud—Costs.*—Observations as to the legal and equitable right of parties to bar known existing adverse claims by fine and non-claim. If, in levying a fine, a direct fraud is practised, this court has undoubted jurisdiction to give relief; but the mere fact that a party levying a fine has good reason to believe that, if he did not do so, an adverse claim might or would be established against him, has never been considered as sufficient evidence of a gross fraud to induce this court to grant relief. An estate was settled on husband and wife for life, with a limitation to their issue, and in default a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to G. D. F., who was the releasee to uses, and had possession of the settlement. G. D. F., shortly after his wife's death, made a feoffment, and levied a fine with proclamations. After the expiration of the five years the heir of the child claimed the estate, insisting that, under the terms of settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against G. D. F. to avoid the fine, alleging that it had been levied with full knowledge of the plaintiff's rights, and with a fraudulent view to bar them: Held, that the act of G. D. F. did not constitute a fraud; that G. D. F. stood in no fiduciary relation towards the plaintiff, and the bill was dismissed with costs. Where a plaintiff imputes personal fraud, which is not proved, it is a reason for awarding costs against him on a dismissal of his bill. *Langley v. Fisher*, 9 B. 90.

FINES. See **LESSOR AND LESSEE**, 3, 4.

FORECLOSURE. See **MORTGAGE**.

FOREIGN COURTS. See **PERPETUATION OF TESTIMONY**.

FORMA PAUPERIS.—*Affidavit.*—The meaning of the common affidavit required on application for leave to sue or defend in formâ pauperis is, that the party has not 5*l.* in the world besides, &c. available for the prosecution or defence of the suit: and if he can make the affidavit with truth in that sense, the omission to set forth the details of his means, and the circumstances which render them unavailable, is not such an omission of material facts as will induce the court on that ground alone to discharge the order. *Dresser v. Morton*, 2 P. 286.

And see **FEME COVERT**, 1.

FRAUD. See **BOTTOMRY BOND**, 1. **CONVEYANCE**, 3. **FINE AND NONCLAIM**. **POWER**, 1, 2.

FRAUDS, STATUTE OF. See **TRUST**, 3.

GENERAL ORDERS. See **AMENDMENT**. **COSTS**, 1, 3, 5. **DISMISSAL**. **EXCEPTIONS**. **FI. FA.** **JURISDICTION**. **PRACTICE**.

GRAFT. See LESSOR AND LESSEE, 7.

GUARDIAN. See WILL, 7.

HABEAS CORPUS.—*Return—Practice.*—Returns to writs of habeas corpus, when disposed of, are to be sent to the record office, and not to be redelivered to the officer who made them. *Oldfield v. Cobbett*, 2 P. 289.

And see INFANT, 2.

HEIR. See RECEIVER, 5.

HUSBAND AND WIFE.—1. *Demurrer—Pin-money—Public policy.*—Observations on deeds of arrangement between husband and wife. A wife having instituted a suit against her husband for a divorce, an arrangement was come to and the husband executed a deed, by which he assigned a house to trustees, to permit the wife to enjoy it and to accommodate herself and children; and an income of 4000*l.* a year was also provided for her separate use, to keep up the establishment for herself and children, upon such a scale and regulated in such a manner as she should think fit, and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous of residing in the house, and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept therein by the wife, he should be at liberty so to do. The suit was discontinued, and the husband partook of the establishment: Held, first, that the deed was not void on any ground of public policy; secondly, that, being a family arrangement and a compromise of disputed rights, there was a sufficient consideration; thirdly, that it was not void for uncertainty; fourthly, that the court could enforce its due performance, both by the wife and the husband, and a demurrer by the husband on these several grounds was therefore overruled. There is annexed to wife's pin-money an implied duty of applying it towards her personal dress, decoration and ornament. *Jodrell v. Jodrell*, 9 B. 45.

2. *Reversionary interest.*—A money fund was vested in trustees upon trust to permit the intended wife, during the joint lives of herself and her intended husband, to take the interest thereof for her separate use; and after the decease of the husband in trust for the wife and her assigns during her life, in case she should survive him; and after the decease of the wife, as to one moiety of the property, upon trust for the sole and absolute use of the wife, to be disposed of by her in such manner as she might by deed or will, notwithstanding her coverture, appoint; and in default of any such appointment upon trust as therein mentioned. The wife cannot, during the coverture, make an absolute disposition of the moiety of the trust fund. *Nixon v. Nixon*, 2 J. & L. 416.

ILLEGITIMATE CHILD. See CONVEYANCE, 2. WILL, 5.

INFANT.—1. *Answer of—Attorney-General's answer—Pleading—Decree without prejudice, &c.*—As to the necessity of infants and the attorney-general raising the points of their defence specifically

by the answer, instead of putting in what is termed the common answer. In a case in which the defence of an infant had not been properly raised and proved, a decree was made for the plaintiff, without prejudice to any bill to be filed by the infant within six months to establish his rights. *Lane v. Hardwicke*, 9 B. 148.

2. *Jurisdiction—Rights of father—Habeas corpus.*—The cases in which this court interferes for the protection of infants are not confined to those in which there is property. The court may make order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon habeas corpus. A husband, whose wife had three years been absconded with his infant children, applied for an order, that his wife's brother, who had assisted in her escape, and had since transmitted to her the income to which she was entitled under her marriage settlement, of which he was a trustee, might either produce the children or disclose the place of the concealment, or, at least, discontinue the transmission of the income. On an affidavit of the brother, that the children were not in his custody or under his control, the order was refused. *In re Spence*, 2 P. 247.

And see ACCOUNT, 2.

INFORMATION. See CHARITY, 2.

INJUNCTION.—1. *Acquiescence—Motion standing over—Practice.*—The circumstance that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the court either to form its own opinion as to the legality of the meditated purpose or to put that question into a course of immediate trial: and, therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused. *Haines v. Taylor*, 2 P. 209.

2. *Acquiescence—Patent—Long user—Practice.*—The court will not generally in doubtful cases restrain by injunction the infringement of an asserted legal right, until its validity has been established by an action at law; but secus, where there has been long uninterrupted enjoyment under a patent, that being regarded as *prima facie* evidence of title. When the court grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action. An injunction granted pending an action to be brought by the plaintiff, for the speedy trial of which special directions were given, was dissolved on the ground of the plaintiff not having duly complied with those directions. *Stevens v. Keating*, 2 P. 333.

3. *Practice—Exceptions—Waste.*—Where after notice of motion by the defendant to dissolve an injunction upon answer filed, the

plaintiff, on the eve of the vacation after Hilary term, filed exceptions to the answer, the court will not entertain such motion. *Quere*, whether in cases of waste the defendant may move to dissolve the injunction? *Perse v. Quely*, 9 Ir. Eq. R. 151.

4. *Practice—Judgment.*—Injunction against proceedings on a judgment granted after premitting the opportunity of pleading at law, when the neglect to do so was accounted for by the creditor's solicitor having said that he would proceed no further if the lands were not subject to the judgment. *O'Neil v. Browne*, 9 Ir. Eq. R. 131.

And see INTERPLEADER. SHIP. WASTE, 1, 2.

INSOLVENT.—1. *Real estate of—Conveyance to purchaser—Judgment creditor.*—A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtors Act: Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110, s. 61. *Hotham v. Somerville*, 9 B. 63.

2. *Tenant for life—Power to lease at best rent—Provisional assignee.*—An estate was limited to L. for life, with power to lease at the best rent. L. demised the lands to a trustee for a term of years to secure an annuity to G., and covenanted to exercise his power of leasing, and afterwards was discharged as an insolvent. L. and G. agreed to demise the lands and accordingly executed the lease: Held, that the provisional assignee was bound to execute the lease, as he took the estate subject to all the equities and liabilities to which it was subject in the hands of the insolvent, and the exercise of the power was for the benefit of the creditors. *Dyas v. Cruise*, 2 J. & L. 460.

And see WITNESS, 3.

INSURANCE. See ANNUITY, 2.

INTEREST.—1. *Judgment.*—By a decree, the plaintiff was declared entitled to a sum for principal and interest on a judgment with interest on the principal until paid: Held, that he was entitled to interest beyond the penalty, the decree not containing, as it should, a direction to limit the interest to the penalty. *Wilson v. Poe*, 9 Ir. L. R. 114.

2. *Trust deed—Judgment.*—Interest beyond the penalty of a judgment claimed in a creditor's suit; 1. because the cognizor had assigned his property in trust to pay scheduled creditors, of whom the cognizee was one; 2. because there had been a decree to account, before the arrear reached the penalty, under which the creditor might have been prevented suing at law; 3. because interest might be recovered at law in an action of debt on the judgment; but not allowed. *Elliott v. Tynte*, Beat. 478.

And see WILL, 8.

INTERPLEADER.—*Practice—Inquiries—Injunction.*—It is

irregular in an interpleading suit to direct any inquiries as to the conflicting claims of the defendants, until the answers of all of them have been put in. Where an injunction has been granted in an interpleading suit, all the defendants are interested in it, and all ought therefore to be served with notice of a motion to dissolve it. On a motion to dissolve an injunction in an interpleading suit, an order was made directing an inquiry as to the title of the defendant, who moved; but with respect to the co-defendant, who had not answered, and did not appear upon the motion, only directing an inquiry whether he had made a claim. After the master had made his report, and the court had pronounced its final order, the order of reference was discharged, and the consequential proceedings set aside at the instance of the plaintiff, on the ground—1st, that the order was irregular in not reciting an affidavit of service on the absent defendant; 2ndly, that it was contrary to the practice to direct any inquiry as to the title of the defendants, until the answers of all of them had come in; and 3rdly, that the inquiry actually directed was defective, in not extending to the title of the absent defendant as well as to that of the other. *Masterman v. Lewin*, 2 P. 182.

INVALID CONTRACT. See **TRUST**, 4.

IRREGULARITY. See **AMENDMENT**. **EXCEPTIONS.**

ISSUE.—*Staying trial—Practice—Costs.*—An application to stay the trial of an issue, for the purpose of obtaining further evidence, refused with costs under the circumstances. *Hargrave v. Hargrave*, 9 B. 153.

And see **MORTGAGE**. **TITHES.**

JUDGMENT.—1. *Judgment creditor—Sale in the lifetime of consignor.*—A judgment creditor cannot have a sale as against other judgment creditors, whose judgments are prior to August, 1840; and *semble*, where his judgment affects a life estate, and he has an equity to throw other incumbrances on other estates, he cannot have those other estates sold to clear the life estate. *Edington v. Bloomfield*, 9 Ir. Eq. R. 115.

2. *Misnomer.*—A judgment was entered up &c. against Mr. H. under a warrant of attorney. In the judgment, warrant of attorney, &c. he was named W. H., his proper name being W. B. H.: Held, that the judgment was valid. *Hotham v. Somerville*, 9 B. 63.

3. *Satisfaction—Assignment.*—A judgment debtor conveyed lands to the plaintiff, covenanting against incumbrances. The judgment creditor afterwards sued out elegits, on which ejectments were brought against the purchaser, who by an arrangement paid part of the debt, and offered to pay the rest if the creditor would assign the judgment to him: the creditor refused to assign, but offered to satisfy it: Held, the plaintiff paying the judgment was entitled to an assignment of it. *Rotheram v. Flynn*, Beat. 555.

And see **INJUNCTION**, 4. **INTEREST**, 1, 2. **RECEIVER**, 6.

JURISDICTION.—*Master of the Rolls—Vice-Chancellor—*

General Orders—Practice.—On a motion to discharge an order of course to amend, in a cause attached to another branch of the court, the Master of the Rolls has not jurisdiction to take into his consideration the conduct of the parties, and will only determine whether the order has been regularly obtained. *Arnold v. Arnold*, 9 B. 206.

And see ANNUITY, 3. INFANT, 2. PERPETUATION OF TESTIMONY. PRACTICE, 6.

LACHES. See CONVEYANCE, 3. **LEGACY.** LESSOR AND LESSEE, 2, 4, 8. TENANT FOR LIFE.

LANDS CLAUSES ACT. See RAILWAY COMPANY.

LEASE. See LESSOR AND LESSEE. MORTGAGE, 6.

LEASING POWER. See INSOLVENT, 2. LESSOR AND LESSEE, 1.

LEGACY.—*Refunding—Laches.*—A testator, after giving some legacies, gave all the rest of his real and personal property to trustees, on trust to sell the realty and invest the produce along with the personal property, as it should from time to time be received from his executors, and among other things to pay 5000*l.* to his daughter, the plaintiff, on her attaining twenty-one, or day of marriage. He appointed the defendants, H. and R., and his widow, executors, and H. and his widow, guardians of the plaintiff. The trustees did not act. More than 5000*l.* was paid into the hands of H., and he paid the plaintiff's maintenance during minority, but not having paid the principal, she, after coming of age, filed a bill against him and R. only to recover it, and there was a decree to account against them. R. then came to a settlement with X., who was residuary devisee and legatee, and having ascertained what would be coming to him, gave a mortgage for so much as was deficient of the personal estate, and X. went into possession of the real estate, R. and X. joining in securing, under the mortgage, pecuniary legacies due to some other legatees. The assets were squandered. The plaintiff filed a bill, making X. a party: Held, that he was bound to refund, and that the mortgage, if given in lieu of assets, should be treated as so much assets for the benefit of the plaintiff and unpaid legatees: Held, also, that the payment to her guardian H. did not bind the plaintiff. A delay of thirteen years, during which the plaintiff did not object to the several dealings with the assets, she not being fully apprised of her rights, held, under the circumstances, not to amount to a release, or to bar the plaintiff's right to relief. *O'Neil v. Hamill*, Beat. 618.

And see PORTIONS. WILL.

LEGACY DUTY. See SOLICITOR, 4, 5.

LEGALITY. See LESSOR AND LESSEE, 6.

LEGATEE. See EXECUTOR AND ADMINISTRATOR, 6. PLEADING, 3.

LESSOR AND LESSEE.—1. *Leasing power—Authority to let—Partial performance of agreement decreed.*—Under a power to lease at the best rent, the highest rent need not be reserved. The

question, what is the test that the best rent has been reserved, and the cases on the subject considered. An authority to let lands may be inferred from the letters and acts of the party. Tenant for life, with power to lease at the best rent, agrees to make a demise for a term warranted by the power, but at a rent which afterwards appears not to be the best rent. There being no fraud in the transaction, the court will decree a partial performance of the agreement, and direct the tenant for life to execute the agreement as far as his estate enables him to do so. *Hartnell v. Yielding* (2 Sch. & Lef. 549) observed upon. *Dyas v. Cruise*, 2 J. & L. 460.

2. *Renewal—Bill to compel a tenant to accept—Laches—Tenantry Act.*—A bill by a landlord against the assignee of his lessees for lives renewable for ever, to compel her, pursuant to a covenant in the lease, to accept a renewal, was dismissed, she having become assignee under circumstances which rendered it inequitable in the landlord to compel her to accept the renewal; and it was dismissed with costs, the court being of opinion that, independently of those circumstances, the landlord had by his laches lost the right to enforce the acceptance of the renewal. The object of the Tenantry Act (19 & 20 Geo. 3, c. 30), and of the local equity of the kingdom of which it is declaratory, is only the relief of the tenant, not that of the landlord; therefore, where a *cestui que vie* died in 1802, and in 1842 the landlord filed his bill against an assignee of the lessee to compel her to accept a renewal, the bill was dismissed with costs, though the case was one of mere laches. *Alder v. Ward*, 2 J. & L. 571.

3. *Renewal—Bishop's lease—Contribution.*—A sublessee of a bishop's lease leased to the plaintiff, covenanting to renew, and to use his best endeavours to obtain a renewal from his immediate lessor. He afterwards purchased his immediate lessor's estate. The bishop refused to renew to him except at a greatly increased fine, which he paid: Held, that he was bound to renew to the plaintiff without any contribution, in consequence of the increase of the bishop's fine. *Landor v. Blackford*, Beat. 522.

4. *Renewal—Fines—Laches.*—A renewal decreed, notwithstanding a delay of four months after notice to renew, served under the Tenantry Act, when the notice insisted on a term to which the landlord was not entitled, and the landlord delayed, after promising to answer inquiries respecting the title made by the tenant; but with costs to be paid by the plaintiff. *Moore v. Sayers*, Beat. 530.

5. *Rent—Reversion.*—A lessee for years having leased for his own term, reserving a profit rent, with a clause of re-entry on nonpayment of it, subsequently mortgaged the lands: Held, that the rent reserved was not a rent-charge, but in the nature of rent upon a demise; and that the personal representative of the mortgagor could recover the lands by ejectment at common law, and would be a trustee for the mortgagee, and therefore that a receiver appointed over the lands, under the Mortgage Act, was justified in enforcing the rent. *Cremen v. Johnson*, 9 Ir. Eq. R. 143.

6. *Specific performance—Contracts partly legal—Waiver.*—The

waiver of a contract is itself a contract and must be acquiesced in by both parties, and when relied on against a tenant must be established by clear and unequivocal evidence. Specific execution of an agreement to lease at a certain rent, with an understanding that the tenant was to pay the tithe rent-charge and poor rate, decreed by directing the execution of a lease at a rent equal to the rent agreed on and the tithe rent-charge, a lease for a longer term having been prepared at that rent by the agent of the landlord, without his authority, on the tenant's representation, and executed by the tenant, and the rent so reserved having been accepted by the landlord. *Semble*, a contract partly legal and partly illegal, if the illegal part be not *malum in se* and rests in understanding only, may be specifically performed so far as it is legally capable of execution. *Carolan v. Brabazon*, 9 Ir. Eq. R. 224.

7. *Specific performance — Graft — Bishop's lease.* — A bishop's lease was granted after the expiration of a former one at a less fine, because the lessee was son to the old tenant, who died without assets to pay the fine; another person was his administrator, but the son had made himself executor *de son tort*; the new lease was held a graft, and the lessee bound to renew to a sub-lessee without contribution. The sub-lessee, having been evicted on the expiration of the term granted by his lease, sued on a covenant to grant an additional term, but the term covenanted to be granted having nearly expired at the time of the decree, instead of a specific performance, an account in the nature of an inquiry *quantum damnificatur* was directed. *MacNulty v. Hamill*, Beat. 544.

8. *Specific performance — Laches.* — Specific performance of an agreement for a lease decreed, after a refusal by the tenant to execute any lease and a delay of six months, though the agreement was to execute a lease on a given day, the landlord having at first insisted on an untenable term, and never prepared or tendered a lease to the tenant according to the usual practice. *Burke v. Smyth*, 9 Ir. Eq. R. 135.

And see VENDOR AND PURCHASER, 3. WASTE, 1, 2.

LIEN. — *Vendor's lien — Security for performance of contract.* — A. conveyed her life estate in lands to her son, in consideration of his paying the rent of a house for her, and supplying her with sufficient hay and corn, and he covenanted to pay the rent and supply the hay and corn: Held, that A. had a security on the estate conveyed in the nature of a vendor's lien for the purchase money, for the performance of the son's contract. *Richardson v. M'Cauley*, Beat. 457.

And see CREDITOR'S SUIT. EXECUTOR AND ADMINISTRATOR, 5. SOLICITOR, 6.

LIMITATIONS, STATUTE OF. — *Annuity — Demurrer.* — An annuity charged on land by will comes within the meaning of the word rent in the 42nd section of the 3 & 4 Will. 4, c. 27, and therefore no more than six years' arrears are recoverable. Where on the face of the bill the time, which operates as a statutable bar, appears

to have elapsed, the Statute of Limitations may be relied on by demurrer. *Ferguson v. Livingston*, 9 Ir. Eq. R. 202.

And see MORTGAGE, 9. VENDOR AND PURCHASER, 3.

LIS PENDENS. See VENDOR AND PURCHASER, 3.

LOAN. See SPECIFIC PERFORMANCE.

LOST WILL. See WILL, 9.

LUNACY.—1. *Allowances out of income to collateral relations—Repairs—Drainage.*—The modern practice of making allowances out of lunatics' estates for their collateral relations disapproved, and to be kept within narrow limits. A comparatively small sum, which the Master had approved as proper to be allowed out of the surplus income of the lunatic, which was very considerable, for drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed by the Lord Chancellor, though no one objected to it. *In re Clarke*, 2 P. 282.

2. *Carriage of commission—Right of strangers to intervene.*—On a contest for the carriage of a commission of lunacy that party is selected who is most likely to bring out the whole truth; subject to which a preference is given to the nearest of kin. Applications by other parties for leave to attend the execution of the commission are in the discretion of the court, and mere relations are not generally allowed to do so unless they have an interest. A suggestion that a party who applied for such leave on the ground of interest, should, as the condition of its being granted, be concluded by the verdict, overruled. *In re Nesbitt*, 2 P. 245.

3. *Committee—Appointment of devisee.*—Observations as to paying for the management of a lunatic's estate and the impropriety of appointing his devisee committee. The decision of the Privy Council reversing the orders of the Lord Chancellor (Rep. Ll. & G. T. P. 503,) observed on. *In re Lanesborough*, Beat. 688.

4. *Committee—Disallowance of money expended for the benefit of the lunatic's estate without authority.*—A committee, who having been authorized by the court to expend a certain sum in re-building a farm-house, expended half as much again in building one of larger size on a different site, was not allowed the excess; although what he had done appeared to be beneficial to the estate. *In re Langham*, 2 P. 299.

5. *Committee—Security—Practice.*—Securities belonging to a lunatic's estate ordered to be deposited with the master for the purpose of reducing the amount of the committee's recognizances. *In re Eagle*, 2 P. 201.

6. *Mental infirmity, what degree of, will support a commission.*—Absolute insanity is not requisite to support an application for a commission de lunatico inquirendo. Such a commission issued in the case of a person whose mind was weakened by epilepsy. *In re Monahan*, 9 Ir. Eq. R. 253.

7. *Partial insanity—Lucid interval—Evidence.*—A deed was

executed by a person who at the time was insane upon particular subjects. *Quære*, whether the jury, being satisfied of the existence of the morbid feeling at the time of the execution of the deed, though not then called into activity, are at liberty to say, that as the lunatic was reasonable in all other respects his deed was valid. *Quære*, if a man is partially insane, and that partial insanity is never removed from his mind, is he capable of entering into solemn acts which he would not have entered into if the subject of his delusion had been touched upon? The acts of the parties to a particular instrument are properly to be taken into consideration of the question whether it was executed during a lucid interval. If a man has been insane and afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to show that he was not as sound a man in his judgments as before his insanity. All that the law requires is, that a man should have possession of his reason so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect. On the question whether a person, found a lunatic, was sane at a particular time, a memorial of registry, executed by him before the time in question, is admissible in evidence, though the deed is not produced or accounted for. And orders and reports made in the matter of the lunacy are admissible to show that such orders and reports were made upon the grounds stated therein, but not as evidence of the truth of the facts therein mentioned. *Creagh v. Blood*, 2 J. & L. 509.

8. *Reconveyance of mortgaged estate—Extra costs of, occasioned by lunacy.*—The costs of proceedings under the 1 Will. 4, c. 60, s. 3, for the purpose of obtaining a reconveyance of a mortgaged estate from a lunatic mortgagee, are to be borne by the lunatic's estate. *In re Townsend*, 2 P. 348.

9. *Supersedeas—Liberty given to a recovered lunatic to manage his own affairs, without superseding commission.*—The lord chancellor will not in general supersede a commission of lunacy after verdict, without seeing the lunatic. A commission cannot be superseded as to the person of the lunatic, and at the same time continued in force against the parties accountable for the lunatic's estate. But a lunatic who has recovered will be allowed, without superseding the commission, to have the control of his fortune, and to superintend the prosecution of accounts against accounting parties, without the intervention of the committee. *In re Gordon*, 2 P. 242.

10. *Trustee—Decree for sale of real estate—Stat. 1 Will. 4, c. 60, s. 18.*—Tenant for life, of estates decreed in a creditor's suit to be sold for payment of debt, is a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18. *In re Milfield*, 2 P. 254.

MARRIAGE.—Consideration.—A. being informed that an eligible offer of marriage was made by the plaintiff to his grand-niece, wrote to her mother—"I have always told you what I intended leaving her, which is 2000*l.*, and which I am now also ready to settle on her, provided there is a proper settlement made on her, and all matters arranged to your satisfaction." He had previously de-

sired that no communication should be made to him till the man was off or on. The plaintiff answered the letter, offering to settle an equal sum, and saying he waited A.'s reply. A. wrote immediately before the marriage disapproving of the match, and saying, that the plaintiff's father should come forward, but the letter was not shown to the plaintiff till just before the marriage ceremony. The plaintiff made a suitable settlement, and the lady's mother was satisfied, and the plaintiff was afterwards well received by A.: Held, that the promise of A. had never become an absolute one, and that there was no representation on the faith of which the marriage was brought about, such as to give plaintiff a claim on A.'s assets. *Madox v. Norton*, 1 Beat. 632.

MARRIAGE SETTLEMENT.—*Notice*—*Prior incumbrance*—*Costs*.—By marriage settlement a rent-charge was granted to trustees and their heirs, upon trusts for the husband and the issue of the marriage; and the lands were granted to other trustees for a term of years, upon trust to secure the rent-charge. One of the trustees of the rent-charge admitted that, before the execution of the settlement, he had notice of a prior incumbrance on the lands; and one of the trustees of the term denied that he had such notice. No evidence of notice was given: Held, that notice to the trustees of the rent-charge was sufficient; but, there being no issue of the marriage in esse, the court would not declare that their interests were bound by the prior incumbrance, but declared that the trustee had notice of it. Costs given against a party, who, by his want of caution in settling an estate without giving notice that it was subject to a prior demand, rendered a suit by the prior incumbrancer necessary to establish his rights. *Wise v. Wise*, 2 J. & L. 403.

And see **ELECTION**, 1, 2. **PORTIONS**, 1, 4. **VOLUNTARY SETTLEMENT**.

MARRIED WOMAN. See **FEME COVERT**.

MASTER. See **RECEIVER**, 1. **SOLICITOR**, 3—10.

MASTER OF THE ROLLS. See **JURISDICTION**. **PRACTICE**, 6.

MINES. See **WASTE**, 1.

MISJOINDER. See **ACCOUNT**, 2.

MISNOMER. See **JUDGMENT**, 2.

MISTAKE. See **VENDOR AND PURCHASER**, 12.

MORTGAGE.—1. *Assignment of debt*—*Costs*—*Decree by court on motion*.—A bill filed for redemption of a mortgage, and an injunction to restrain a sale under a power alleged to have been fraudulently inserted in the deed, contained various charges of oppression and misconduct against the defendant, on the ground of which it prayed that he might pay the costs of the suit. On a motion for an injunction, supported by affidavits of those charges, the defendant submitted to an immediate account, the plaintiff undertaking to pay what should be found due, and further directions and

costs were reserved : Held, on a subsequent hearing of the cause for further directions, that the affidavits filed on the former occasion could not be read, the first order having shut out all the merits except the account. And an order giving the plaintiff the costs of the suit on the ground of those affidavits was on appeal dismissed, and the defendant was allowed his costs, according to the ordinary rule. *Dunstan v. Patterson*, 2 P. 341.

2. *Conditional purchase*.—The owner of an equity of redemption conveyed it by a conveyance, absolute on the face of it, to the mortgagee. A contemporaneous memorandum was executed declaring that, if he repaid the consideration at any time within three years, the mortgagee would re-convey. The purchase money was the amount at which the lands were valued, and possession followed the deed, and there was parol evidence to show that the transaction was a purchase, and not a mortgage : Held, a conditional purchase, and not redeemable. *Neal v. Morris*, Beat. 597.

3. *Equitable mortgage—Priority*.—A power of attorney to receive rents, accompanied by an agreement that it should be irrevocable until the principal and interest of a loan, and the premiums on a policy of assurance effected to secure it, should be paid off, by instalments, as specified in the agreement, is irrevocable, and amounts to an equitable mortgage, and the mortgagee is entitled to priority over a subsequent creditor by judgment, affecting the legal estate in possession by a receiver. *Whitworth v. Gaugain*, 3 Hare, 421, approved of. The Docketing Acts, 7 Will. 3, c. 13, and 3 Geo. 2, c. 7, apply only between purchasers and judgment creditors, and give no priority to judgments inter se. *Abbott v. Stratton*, 9 Ir. Eq. R. 233.

4. *Equitable mortgage—Priority—Redemption*.—P. D. mortgaged estates X. and Y., and as a collateral security his sons assigned their estate in N. P. D. afterwards sold X. to the defendant, covenanting against incumbrances. The mortgagee purported to be a party to the conveyance, but never executed it, and P. D.'s sons joined in a bond to indemnify the defendant against all incumbrances. In 1805 the mortgagee filed a bill to foreclose against P. D., his sons, and the defendant. In 1806 the sons of P. D. made an equitable mortgage of N. to the plaintiff, who took without notice of the defendant's claim : Held, that the transaction at the purchase gave the defendant a right as against P. D.'s sons to have N. applied to pay the mortgage before the lands sold to him, and as the equitable mortgage was made to the plaintiff, pending a suit in which that right would be given effect to, he took subject to the same liability. *Semble*, if it were not for the pendency of the suit, the plaintiff, as equitable mortgagee, would have had priority to the defendant : Held also, that the plaintiff was entitled to have Y. sold, and to redeem the mortgage on N. *Going v. Farrell*, Beat. 472.

5. *Mortgagee in possession—Injunction—Ejectment*.—A mortgagee in possession, who appears upon the pleadings to be paid off, and has given security for the payment of the rents into court, will

be restrained by injunction from ejecting the tenants in occupation of the lands, although the answer claims a sum to be still due. Discussion of the powers of a mortgagee in possession. *Robinson v. Maguire*, 9 Ir. Eq. R. 268.

6. *Notice—Registry—Lease.*—A mortgagor mortgaged estate X by a deed containing a borrowing clause. On a further loan he mortgaged Y. to secure the entire money borrowed: Held, that the conveyance of X. by the mortgagee's representatives, treating it as mortgage only, was, under the old law, a sufficient acknowledgment to keep alive the right to redeem Y. The mortgagee while in possession made a lease; the mortgage was registered. The lessee set up a title as a purchaser without notice, and also relied on there being no acknowledgment to bind him: Held, 1st, that the registration gave priority to the mortgagor's equitable title, which rendered notice immaterial; and 2ndly, that the acknowledgment by the mortgagee alone was sufficient against his lessee. *Ball v. Lord Riversdale*, Beat. 550.

7. *Purchaser of equity of redemption.*—A., being the owner of premises subject to a charge of 1000*l.*, granted an annuity charge on them to the plaintiff. The premises were afterwards sold to B. who had notice of the annuity. The conveyance purported to be in consideration of 6*l.* By another deed the 1000*l.* charge and the term securing it was assigned to a trustee for B. B. in his answer admitted that he paid 1006*l.* for the purchase of the premises, of which 1000*l.* was paid to the owner of the charge. B. went into possession: Held, that B. was entitled to hold the charge for the amount of principal and interest due on it, and the plaintiff should only be at liberty to redeem him, he accounting as a mortgagee in possession. *Unthank v. Gabbett*, Beat. 453.

8. *Salvage advances—Redemption.*—Advances made by a mortgagee for the preservation of the estate (ex. gr. head rent paid by him) follow the nature of the mortgage security, and if the mortgagee is not entitled to foreclose the mortgage until after the decease of mortgagor, neither is he entitled, during the life of the mortgagee, to a sale of the estate for payment of such advances; but, if necessary, a receiver will be appointed to keep down the interest on the mortgage debt and advances. The proviso for redemption in a mortgage of a leasehold for years was, that upon payment of the principal on a day mentioned, and interest thereon, and the head rents in the meantime, the deed should be void. By deed of equal date, reciting that the agreement of the parties was, that the principal should not be called in until after the decease of the mortgagor, but that by mistake it was not stated in the mortgage deed that the principal money should not be called in until after the decease of the mortgagor, any thing in the deed of mortgage to the contrary notwithstanding: Held, that the mortgagee could not foreclose the mortgage during the life of the mortgagor, though the interest was in arrear, and the mortgagor had not paid the head rent. *Burrows v. Molloy*, 2 J. & L. 521.

9. Tenant for life—Statute of Limitations—Tenant in common—Issues.—The personal representative of a deceased tenant for life of a mortgaged estate is not a necessary party to a bill by the mortgagee against the remainderman, although the bill pray payment of an arrear of interest which accrued during his life-time. Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death, and the same rule applies where the mortgagee is a tenant in common with others, of the mortgaged estate. Form of issues directed in a foreclosure suit to ascertain whether a mortgage deed, forty-five years old, had ever subsisted as a security, and if so, whether it had been satisfied. *Wynne v. Styan*, 2 P. 303.

And see **BOTTOMRY BOND**, 1, 2. **LUNACY**, 8. **SALE UNDER COURT**, 1. **SOLICITORS**, 7.

NEGLECT. See **EXECUTOR AND ADMINISTRATOR**, 1.

NEXT FRIEND. See **FEME COVERT**.

NON-RESIDENCE. See **ECCLESIASTICAL RIGHTS**.

NOTICE. See **MARRIAGE SETTLEMENT**. **MORTGAGE**, 4, 6. **VENDOR AND PURCHASER**, 3.

NUNC PRO TUNC. See **EXCEPTONS**, 3.

OMISSION IN DECREE. See **CONVEYANCE**, 4.

OPEN QUARRIES. See **WASTE**, 1.

ORDERS OF COURSE. See **EX PARTE ORDERS**. **PRACTICE**, 6.

PARENT AND CHILD. See **INFANT**, 2.

PARTIES. See **MORTGAGE**, 9. **PLEADING**. **SUPPLEMENTAL BILL**, 1.

PARTNERSHIP.—*Prayer of bill.*—A. having been in partnership with B., after B's death carried on the same business, and disposed of the stock and bought in new. Shortly after B's death a valuation was made, by which the property that had belonged to the partnership was estimated at a certain value. The business subsequently declined. On a bill filed by the representatives of B., A. was charged with the amount of the valuation and interest since B's death, though the bill only prayed a partnership account. *Booth v. Parkes*, Beat. 444.

PATENT.—*Practice—Appeal for costs—Infringement of patent.*—The rule which prohibits an appeal for costs alone is confined to those cases in which the correctness of the decision as to costs cannot be judged of without rehearing the cause upon the merits, and therefore does not apply to a case in which the error of such decision is apparent on the face of the decree or order appealed from. Where a bill to restrain an alleged infringement of a copyright is retained, at the hearing, with liberty to the plaintiff to bring an action, and the action is accordingly brought and fails, it is of course that the bill

should be dismissed with costs, and therefore if dismissed without costs, it is error on the face of the decree. *Chappell v. Purdy*, 2 P. 227.

And see INJUNCTION, 2.

PAYMENT. See SOLICITOR, 8, 9, 10. WILL, 10.

PAYMENT OUT OF COURT.—*Unclaimed money—Presumption of death.*—A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India but who was never afterwards heard of. In 1837, the Master having certified, upon presumption, that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842 the Master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment to the same party of the accumulations since that time. And in 1847 it ordered payment of the rest of the fund to the same party, though resident abroad, upon his giving his personal security to refund in case the annuitant or her personal representative should ever establish a claim. *Cuthbert v. Purrier*, 2 P. 199.

And see FEME COVERTE.

PERPETUATION OF TESTIMONY.—*Foreign courts—Jurisdiction.*—It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony, that the proceedings for which they are required are in the court of a foreign country, or that other depositions taken in a similar suit in that country have already been published. *Semble*, this court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. *Morris v. Morris*, 2 P. 205.

PETITION. See CONVEYANCE, 4.

PIN MONEY. See HUSBAND AND WIFE, 1.

PLAINTIFF. See WITNESS, 3.

PLEADING.—1. *Insufficient statement of title—Demurrer—Parties.*—Plaintiff by his bill stated that A. by deed conveyed certain lands to trustees, to the use of B. for life, remainder to his issue male; and that the lands so conveyed were held by A. under and by virtue of certain leases, or agreements for leases, for lives, renewable for ever on certain terminable leases or agreements for terminable leases; the dates and particulars of which plaintiff could not set forth, by reason of the same and the other muniments of the title being lost, or in defendant's possession, having been delivered to him by B., on a sale to him of B.'s interest. The plaintiff, as first tenant in tail, sought a discovery of the deeds, and that certain renewals obtained by B. in his own name might be decreed a graft on the original leases, and for an injunction to stay waste: Held, on demurrer, that the reasonable construction of the statement was that

the lands were held by A. at the time of the execution of the deed; that the statement of the title of A. was not under the circumstances open to demurrer, inasmuch as the same principle which excuses a plaintiff from setting out a defendant's title ought to excuse him setting out the title of a party under whom plaintiff derives, while the defendant wrongfully withholds the possession of the title-deeds from him. *Semble*, such objection cannot be made upon a general demurrer for want of equity: Held, also, that the surviving trustee was not a necessary party. *Hill v. Mill*, 9 Ir. Eq. R. 164.

2. *Parties—Breach of trust.*—A party entitled to a moiety of an ascertained fund cannot maintain a suit for payment of his share without making the person entitled to the other moiety a party, if, owing to breach of trust, the whole fund is not forthcoming; *Semble*; and the decision in *Perry v. Knott*, 5 Beav. 293, to the contrary disapproved. *Lenaghan v. Smith*, 2 P. 301.

3. *Parties—Demurrer—Administration suit—Legatee.*—It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate. It is the duty of the executors to protect the estate against improper demands. But where a question directly occurred between the residuary legatee and a pecuniary legatee, which it was found impossible to determine in a general administration suit, and a suit was afterwards instituted by the residuary legatee against the pecuniary legatee and the executor to determine it, a demurrer by the pecuniary legatee, on the ground that he had improperly been made a party, was, under the special circumstances, overruled. *The Marquis of Hertford v. The Countess de Zichi*, 9 B. 11.

4. *Parties—Trustees for separate use of feme covert.*—To a bill to raise a demand out of property vested in trustees for the separate use of a feme covert, the trustees ought to be made answering parties. *Peppard v. Kelly*, 2 J. & L. 558.

And see INFANT, 1. PRO CONFESSO. REHEARING. SUPPLEMENTAL BILL, 1.

PORTIONS.—1. *Construction of deed—Power of appointment—Consent to marriage.*—Testator devised lands to P. upon trust to convey them to his three sons, in such shares as P. should appoint; and in default of appointment he gave the lands to them equally, as tenants in common. In 1786 P., in execution of the trust, conveyed part of the lands to the use, that in case S. (one of the sons) should marry, with the consent of P. first obtained, but not otherwise, such woman or women as he should so marry, in case she should survive him, should, during her life, receive for jointure such annuity (not exceeding a certain sum) as S. should appoint: and to the further use, in case S. should marry with such consent, but not otherwise, that he might by deed or will charge the lands with 500*l.* for portions for his younger children, payable in such shares as he should appoint. In 1788, S. married with consent, and, reciting his power, covenanted that the trustees of his settlement, in case there should

be one or more younger children of the marriage living at his death, should raise 500*l.* out of the lands; the said sum to be divided in such shares and proportions amongst such younger children as he should by will appoint, and for want of appointment, equally. There was issue of this marriage three younger children. S., after the death of P., married a second wife, and charged the lands with an annuity for her jointure; and died, leaving his wife and four children of his second marriage, and the three younger children of his first marriage, surviving. By his will in 1842 he appointed 1*s.* to each of the children of the first marriage, and the residue among the children of the second marriage: Held, upon the construction of the settlement in 1786, and the circumstances that the consent of P. was only requisite to any marriage of S. which should take place in his lifetime; and that the children of the second marriage were objects of the power; that the settlement of 1788 amounted to a contract, that so far as S. could bind his power, the children of the first marriage should take the fund equally between them, if he did not otherwise apportion it amongst them; that, upon there being issue of the second marriage, S.'s power of appointment was gone; and that the children of both marriages were entitled to the fund equally between them as one class. *Green v. Green*, 2 J. & L. 529.

2. *Election*.—By a deed, reciting that estates were charged with 1000*l.* for younger children under a previous settlement, the lands were resettled and a sum of 2500*l.* charged for the younger children. The previous settlement really charged the lands with 2000*l.*; the younger children claiming both the 2000*l.* and 2500*l.*: Held, that there was no case for election between the deeds, but merely a misrecital, and if the real intention was to charge the 2500*l.* in addition to 1000*l.* only, it should have been proved by parol evidence. *Ruby v. Foot*, Beat. 581.

3. *Legacy—Power of appointment—Vesting*.—A. having a power under a will to charge a sum of money on B.'s estate, as and for a provision for his lawful issue, exercised the power by a deed merely charging the estate with the sum, as a provision for his lawful issue. A. had several children, one born at the testator's death, others at the date of the deed, and others subsequently: Held, that all the children were entitled to shares, which vested seriatim on their successively attaining twenty-one, the share of each proportioned to the number of children in esse when it vested, and not before provided for, the children attaining twenty-one being regarded as successive new periods of distribution; though this produced considerable inequality in the shares, and would wholly disappoint any child born after the others had all attained twenty-one; grandchildren to be considered as provided for by their parents' shares. This principle is not applicable to a legacy, the rule being, that whenever a legacy is given to a class of persons, if the gift is immediate, those only take who answer the description at the testator's death; and when the enjoyment is deferred, as by the intervention of a life estate, or

appointment of a future time for payment, those take who answer the description at the prescribed period. *Norman v. Norman*, Beat. 430.

4. *Marriage articles—Survivorship and accruer—Issue.*—By articles executed in consideration of marriage and the fortune of the wife, it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest, and also the principal sum (subject to an annuity by way of jointure for the wife), to the issue of the marriage, in such shares and proportions to any one or more of them, in exclusion of the others of them, as the husband should by deed or will appoint, and in default of appointment to all the issue, in equal shares, to such of said issue as should be sons at twenty-one, and to such of them as should be daughters at twenty-one or marriage. And that power should be given to pay towards the advancement of any of said issue any sum not exceeding one-half of the principal sum belonging to such child respectively; and in case there should be no issue, or all such issue should die in the lifetime of the husband, then that the entire of the trust funds, subject to the jointure, should vest and be assigned and go to the husband, his heirs, executors, &c. absolutely, for his and their sole use and benefit. And it was further agreed, that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper: Held, 1. That the word "issue" in the articles was to be read "children." 2. That the settlement ought to contain clauses vesting the shares of the sons in them at twenty-one, and of the daughters in them at twenty-one or marriage; and also clauses of survivorship and accruer of the shares of sons dying under twenty-one, and of daughters dying under that age without having been married, in favour of the surviving or other children. 3. That the husband was entitled to the fund, either in the event of his surviving all his children or of no child attaining a vested interest therein, and that the settlement ought to contain clauses accordingly. *Roche v. Roche*, 2 J. & L. 561.

5. *Vesting.*—The trusts of a term were, at twelve years from a mother's death to raise 2500*l.* for younger children; 1000*l.* of it for one of them, A., and the remainder for the others, to be paid to them respectively when raised pursuant to the deed. The deed was one in which the mother, being tenant for life, joined her eldest son, the remainderman, in opening the estate. A. died in his mother's lifetime: Held, the 1000*l.* was not vested and could not be raised. A charge payable at a future day is, in general, not raisable, if the party die before the day, except when the time of payment is postponed for the convenience of the estate, when it is otherwise; but this exception does not apply to children's portions, which are not generally raisable for the child's representative, if he dies before he wants a provision. The rule and case on this subject considered. *Ruby v. Foot*, Beat. 581.

POWER.—1. *Appointment—Suspicion of fraud.*—Strong suspicion that an appointment by a father to his son was for the benefit

of the father, and a fraud upon the power of appointment, is not sufficient to avoid the transaction. *Hamilton v. Kirnan*, 21. L. 393.

2. *Execution of—Fraud.*—A father was tenant for life of certain estates, with remainder among his children, in such shares, &c. as he should appoint, and was also absolute owner of other property. Having two daughters, on the marriage of the elder, the other being very young, he limited all his estates in trust to secure himself an annuity until certain scheduled debts were paid, and then to divide the rents equally between him and his daughter's husband, during his life; remainder for a term to secure 2000*l.* for the younger daughter; remainder, subject to a jointure for his widow, to his daughter's husband and herself, and their issue, in strict settlement. Held a good execution, not being a fraud on the power from the benefit the donee took himself, as he settled the additional property, and the limitations to the daughter's issue being good, as made with the consent of the object of the power. *Conolly v. M'Dermott*. Beat. 601.

And see PORTIONS, 1, 3.

PRACTICE.—1. *Answer—Taking answer off the file.*—A bill containing reflections on a party, ordered by consent to be taken off the file. *Clifton v. Bentall*, 9 B. 105.

2. *Bill and cross bill—Answer.*—Until the defendant in the original cause has answered, he is not entitled to call on the plaintiff to answer his cross bill. Therefore, before the defendant in the original cause has answered, he cannot stay the proceedings in that cause till the defendant in the cross cause (the plaintiff in the original), though out of the jurisdiction, shall answer the cross bill. But after answering the original bill, the plaintiff in the cross cause can stay publication in the original cause till the cross bill be answered. *Raikes v. Cherry*. 9 Ir. Eq. R. 140.

3. *Consent.*—The court will not make a consent a rule of court, unless the names of all the parties in the suit are stated in the consent. *Minchin v. Walpole*, 9 Ir. Eq. R. 139.

4. *Erroneous decree to account—Semble*, when the court has erroneously made a decree to account, it is not bound to continue the error by further proceedings in the suit, on the return of the master's report. *Roberts v. Hughes*, Beat. 417.

5. *Note at foot of bill—Irregularity.*—Where the bill required one defendant only to answer by the note at foot, though subpoenas to answer were prayed against others, and the interrogating part was not divided or numbered: Held not to be irregular within the meaning of the 12th General Order. If a bill be irregular in consequence of the interrogating part not being divided or numbered, the proper course is to stay the proceedings, and not to move to take it off the file.—*Burne v. Burne*, 9 Ir. Eq. R. 205.

6. *Order of course—Amendment—Master of the Rolls—General Orders—Jurisdiction.*—An order of course for referring exceptions for insufficiency, obtained within the proper limit as to time, but

amended after its expiration, discharged for irregularity. An order of course may be amended before service; but *semble*, that after service it cannot be amended in the absence of the party to be affected thereby. In discharging an order of course attached to another court, the Master of the Rolls has not authority to direct the costs to be costs in the cause. *Wool v. Townley*, 9 B. 41.

7. *Proof of exhibit*.—Where the defence was, that the deed of assignment under which the plaintiff claimed was executed after bill filed, and was in trust for the assignor, against whom the defendant filed a cross bill: Held, that the assignment could not be proved by affidavit at the hearing under the 97th General Order. *Joly v. Swift*, 9 Ir. Eq. R. 195.

8. *Right to begin*.—When a cause is heard on an objection for want of parties, the party who took the objection begins. *Prim v. M'Kenny*, 9 Ir. Eq. R. 115.

And see CONTEMPT. COSTS. CREDITORS' SUIT. DISMISSAL. EXCEPTIONS. EX PARTE ORDERS. FEME COVERTE. HABEAS CORPUS. INJUNCTION. INTERPLEADER. ISSUE. PATENT. PRODUCTION OF DOCUMENTS. RECEIVER. REHEARING. SALE UNDER COURT. SOLICITOR. STAYING PROCEEDINGS. STOP ORDER. TITHES. WITNESS.

PRINCIPAL AND AGENT.—1. *Letting lands—Under-value*.—An agent to let lands is bound to let them to the best advantage; but, upon the mere ground of under-value, a bonâ fide letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if the agent has acted fairly and honestly. *Dyas v. Cruise*, 2 J. & L. 460.

2. *Purchase—Concealment*.—If in a transaction between principal and agent it appears that there has been any under-hand dealing by the agent,—ex. gr. that he has purchased the estate of the principal in the name of another person instead of his own, however fair the transaction may be in other respects, it has no validity in a court of equity. To set aside a sale from a principal to his agent, it is not necessary to show that it was made at an under-value. An agent may purchase from his principal, provided he deals with him at arm's length, and after a full disclosure of all that he knows with respect to the property. *Murphy v. O'Hea*, 2 J. & L. 422.

PRIORITY. See MORTGAGE, 3, 4.

PRIVILEGED COMMUNICATION. See SOLICITOR, 11.

PRO CONFESSO.—*Admission of facts*.—By suffering the bill to be taken as confessed against him, the defendant admits the facts stated in it; but the plaintiff must show that the facts so admitted entitle him to relief. *Simmonds v. Palles*, 2 J. & L. 489.

PRODUCTION OF DOCUMENTS.—1. *Amended bill*.—On a motion for production of documents, it is for the plaintiff to show from the admissions in the answer that the documents relate to the contents of the bill as it stands when the motion is made. And therefore, where, after an answer admitting possession of certain documents relating to the matters mentioned in the bill, or some of

them, the plaintiff amended his bill by striking out part of it, and then moved upon that answer, the motion was refused. *Haverford v. Pyman*, 2 P. 202.

2. *For limited period—Practice.*—It is not the practice to order the production of documents admitted in the answer for a limited period. *Att.-Gen. v. Bingham*, 9 B. 159.

3. *Reference to document in answer.*—The plaintiff sought a renewal of a lease not in his possession; the defendant's answer denied his right to the renewal, "inasmuch as he is convinced from documents in his possession, to which he will hereafter more particularly refer, that no such lease was executed." Defendant then stated that it appears by a certain deed and schedule, which he admitted to be in his possession, that a lease for a different term and rent had been executed, and that it is manifest from the schedule, a renewal, if obtained, was fraudulent: Held, that the defendant had referred to the deed and schedule in such a way as to make it part of his answer, and was bound to produce it. *Phelan v. Hamilton*, 9 Ir. Eq. R. 264.

PROVISIONAL ASSIGNEE. See INSOLVENT.

PUBLIC POLICY. See HUSBAND AND WIFE, 1.

PUBLIC TRUST. See TRUST, 9.

RAILWAY COMPANY.—*Lands Clauses Consolidation Act—Form of condition of bond.*—The condition of a bond given by a railway company, under the 85th section of the 8 Vict. c. 18, on taking possession of land before the purchase money was ascertained, was "on demand to pay to the owner, or on demand to deposit in the Bank, the amount of such purchase money when determined:" Held, that the condition was bad, as giving the party claiming to be owner the option of compelling payment, either to himself or into the Bank, whatever the title might turn out; and an injunction was granted till a proper bond should be executed. *Poynder v. Great Northern Railway Company*, 2 P. 330.

RECEIVER.—1. *Accounts—Master's certificate—Four-day order.*—Upon the master's certificate that a receiver is in default, the four-day order upon him is of course, and therefore a motion to discharge such order on the ground of error or irregularity in the certificate, but not directly impeaching the certificate itself, will be refused. *Scott v. Platell*, 2 P. 229.

2. *Bygone rents.*—When a receiver is appointed by a puisne creditor, and afterwards extended by a prior creditor, the rents received before the extension of the receiver, but not paid over, belong to the puisne creditor. Rents not received until after the extension of a receiver, though due before, belong to the prior creditor; whether the contest be between claimants under different causes, or between the parties to a suit and a judgment creditor who has proceeded by petition under the judgment acts, or between two judgment creditors, one appointing and the other extending the receiver under these acts. Arrears of rent due at the time a receiver

is appointed under the judgment acts, but received after, belong to the judgment creditor. The cases on these questions reviewed and observed upon. *Abbott v. Stratton*, 9 Ir. Eq. R. 233.

3. *Costs*.—An adverse application was made against a receiver by a party to the cause which was refused with costs. The applicant being wholly unable to pay the costs: Held, that the receiver was entitled to be indemnified and have his costs, as between solicitor and client, out of the fund in hand belonging to incumbrancers. *Courand v. Hanmer*, 9 B. 3.

4. *Same*.—A receiver who, without the sanction of the court, defends an action brought against him by a party to the cause, is not on that account disentitled to the assistance of the court in recovering from such party the extra costs of the action, although if his defence had failed he would not, under such circumstances, have been entitled to reimbursement. *Bristowe v. Needham*, 2 P. 190.

5. *Heir—Admission of title—Practice*.—A receiver will not be appointed where the rights, as between the plaintiff and defendant, are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to his security is alleged. The plaintiff sued as heir, and the answer neither admitted nor denied that he held that character: Held, that this alone was not a sufficient ground for refusing a receiver. *Lancashire v. Lancashire*, 9 B. 120.

6. *Judgment*.—*Semble*, it is good cause against the appointment of a receiver under the judgment acts, that the party against whom the judgment was obtained was only a trustee of the lands. *O'Neill v. Browne*, 9 Ir. Eq. R. 131.

7. *Same*.—A judgment creditor having in 1836 obtained a conditional order for a receiver, a consent order was made in 1837 that the respondent should pay the instalments, and in default that a receiver should be appointed. Upon default in 1846, the creditor presented a petition to extend a receiver appointed in the meantime in the matter of a puisne creditor: Held, that the petition was a continuation of the original petition, and that it was not necessary to revive the judgment: Held also, that the application should properly be by motion. *Dyas v. Cruise*, 9 Ir. Eq. R. 256.

8. *Same*.—A judgment creditor having obtained a receiver under the judgment acts over certain lands of his debtor, may, after the lapse of more than a year, get a receiver under the acts over other lands of the debtor, without reviving his judgment. *Clendinning v. Lord Oranmore*, 9 Ir. Eq. R. 150.

9. *Notice—Forma pauperis—Meaning of the common affidavit—Suppression of material facts—General Order*.—The notice required by the 88th Order of May, 1845, does not apply to proceedings for appointing a receiver, but only to his taking possession of the estates when appointed. *Dresser v. Morton*, 2 P. 285.

10. *Solicitor*.—The 143rd General Order applies as well to the extension as to the appointment of a receiver; and therefore where a solicitor's clerk was appointed a receiver before the making of the order, he will not be extended to other lands of the debtor on the

application of another judgment creditor. *Meara v. Egan*, 9 Ir. Eq. R. 259.

REDEMPTION. See MORTGAGE, 1, 4, 7, 8.

REFUNDING. See LEGACY.

REGISTRY. See MORTGAGE, 6. VENDOR AND PURCHASER, 1.

REHEARING.—*Pleading—Creditor's suit—Review—Practice*—Generally the court leaves the question of rehearing to the certificate of counsel, reserving nevertheless its power and jurisdiction, and if the order to rehear be obtained under such circumstances, or in such a manner that any party has a right to complain, the proper proceeding is to apply to take the petition off the file. Where a person not a party to the suit is desirous of obtaining a rehearing, he must apply for leave to present a petition to rehear. A bill by a creditor to obtain relief inconsistent with an order in a previous suit, was filed nearly twenty years subsequent to the date of the order, and prayed that the order might be reviewed. An application to rehear the former suit was refused, on the ground of laches, acquiescence, and length of time, but with liberty to renew the application at the hearing of the second suit. A party who comes in in a creditor's suit, intrusting the management of the suit to the plaintiff, must, upon an application to review the proceeding, stand in the place of the plaintiff, and, in the absence of fraud, be bound by his knowledge. *Gwynne v. Edwards*, 9 B. 22.

RENEWAL. See LESSOR AND LESSEE, 2, 3, 4. TENANT FOR LIFE.

RENT. See LESSOR AND LESSEE, 5.

RENT-CHARGE. See ANNUITY, 3.

REPAIRS. See LUNACY, 1.

REPUDIATION. See TRUST, 3.

REVERSION. See HUSBAND AND WIFE, 2. LESSOR AND LESSEE, 5.

REVIEW. See REHEARING.

REVIVOR. See COSTS, 5.

RIGHT TO BEGIN. See PRACTICE, 8.

RIVER.—*Powers of conservancy—Commissioners—Demurrer*.—Under an act of parliament by which the conservators of river banks were empowered to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands,) in doing, constructing, and executing all such works, acts, matters, and things, as they should from time to time deem necessary, proper and expedient for putting the banks into and maintaining the same in a state of permanent stability: Held, that they were authorized to apply a portion of the fund in watching, and, if necessary, opposing, a bill in parliament for a project lower down the river, which was

likely to be injurious to the banks under their superintendence. *Bright v. North*, 2 P. 216.

SALE. See PRINCIPAL AND AGENT, 2. TRUST, 3, 7. VENDOR AND PURCHASER.

SALE UNDER COURT.—1. *Commission on sales—Right of mortgages of ship and cargo to charge—Distinction between sale under power in deed, and under order of court.*—A broker having taken an assignment of several cargoes in trust to sell them on their arrival, and out of the proceeds to repay himself the amount of his advances, took possession of some of the cargoes, and sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed that they should be sold by him in such manner and at such time as he and the receiver in the cause should agree, and in the event of their differing, then as the master should direct: Held, that, in the latter sales, he was entitled to the usual commission allowed to brokers employed by the court; but that, in the former, he was not entitled to any commission, having sold as trustee. *Arnold v. Garner*, 2 P. 231.

2. *Plaintiff allowed to bid at sale.*—Where lands, decreed to be sold for payment of the plaintiff's demand, were of insufficient value, and no bona fide bidders could be procured, the court permitted the plaintiff to bid without taking from him the carriage of the decree. *Spaight v. Patterson*, 9 Ir. Eq. R. 149.

SERVICE. See COPY BILL. SOLICITOR.

SETTLEMENT. See ELECTION, 1, 2. FEME COVERT. MARRIAGE SETTLEMENT. PORTIONS.

SHIP.—1. *Injunction to prevent sailing—Part owner—Security.*—The court will not restrain a ship from sailing, on the application of the part owner of the smaller ascertained share. The proper application is to the Court of Admiralty to compel the larger part owner to give security. This court interferes only where the shares are unascertained. And the application to restrain is too late when the ship is on the point of sailing with emigrants. *Hellaran v. Donal*, 9 Ir. Eq. R. 217.

And see BOTTOMRY BOND. SALE UNDER COURT, 1.

SOLICITOR.—1. *Costs—Counsel's briefs and fees.*—The plaintiff's solicitor is entitled to give out briefs and fees to counsel upon the same day that he sets down the cause to be heard pro confesso. *Ivis v. Gahan*, 9 Ir. Eq. R. 223.

2. *Costs—Counsel's clerks' fees—General orders.*—Fees to counsel's clerks are mere gratuities, for which they have no legal demand, and this court has no jurisdiction in respect of such fees as against the clerks. The sum allowed for clerks' fees on taxation does not limit the sum which may be spontaneously given; but it does limit the sum which the solicitor can safely pay without the special direction or permission of the client. The regulation of the 5th Nov.

1840. (Ordines Can. 157), is not a general order of the court, giving the clerks a legal demand for the fees therein mentioned, but a mere intimation of the opinion of the equity judges, that they may be properly allowed in taxation. Petition against a clerk of court dismissed for want of jurisdiction, but without costs, on account of his improper conduct in the matter complained of. *Ex parte Coston*, 9 B. 107.

3. *Costs—Taxation—Counsel's fees—Affidavit—Practising master.*—The fact of a petition being unopposed, is not of itself a sufficient reason for the disallowance of the costs of two counsellors. Costs of two counsel, upon a petition of a retiring trustee for a reference to appoint a new trustee, and of a petition to confirm the master's report, allowed under the circumstances. A petition to review a taxation was successful, but the petitioner, not having taken proper steps to satisfy the taxing master when the matter was in his office, was ordered to pay the costs. The court having determined to communicate with the taxing master as to a proceeding in his office, declined to receive an affidavit, tendered by the parties, of what had there taken place. *Sturge v. Dimdale*, 9 B. 170.

4. *Costs—Taxation—Legacy duty—Gratuities to clerks.*—An order was made for the division and transfer of a fund in court, but before it could be completed the fund became altered, and the solicitor presented a petition for a similar object: Held, that it could not be considered as unnecessary, it appearing that the solicitor using his best exertions was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solicitor was therefore allowed the costs upon taxation. Expedition money, paid by a solicitor to a stationer or writing clerk employed in the registrar's office, disallowed upon taxation. A gratuity paid to the clerks of the Accountant-General's office was disallowed to the solicitor on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available. *In re Bedson*, 9 B. 187.

5. *Costs—Taxation—Legacy duty.*—As to what items of disbursement are properly included in a bill of costs. Legacy and probate duties, estimated at 140*l.*, were payable in order to make available certain funds in court. The solicitor, at the request of the client, engaged to pay them, and took a charge on the funds for 140*l.* and interest. The duties, amounting to 78*l.* only, were paid by the solicitor: Held, that sum formed a proper item in his account on the taxation of his bill of costs. *In re Bedson*, 9 B. 5.

6. *Costs—Taxation—Lien.*—A solicitor's lien upon the fund is not a general lien; it extends only to costs in the cause, and costs immediately connected with costs in the cause,—as, for instance, the costs of successfully protecting a solicitor's right to the costs in a cause. *Lucas v. Peacock*, 9 B. 177.

7. *Costs—Taxation—Mortgagor and mortgagee.*—Petition by mortgagor for taxation of the mortgagee's solicitor's bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of

pressure nor any specific item of overcharge. *Dunt v. Dunt*, 9 B. 146.

8. *Costs—Taxation—Payment—Agent.*—Where the taxing-master has received no special directions from the court in regard to payments made by a client to his solicitor, it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs. In ascertaining what is due on bills of costs, and in the consideration of what payments have been made on account of them, questions of law and fact of considerable difficulty may incidentally arise, and may possibly justify and require discussion and determination, even in the jurisdiction exercised by the court on petitions for taxation. *In re Smith*, 9 B. 182.

9. *Costs—Taxation—Payment—Agent.*—A. B., a married woman, conveyed her separate estate to C. D. in trust to sell, &c., and pay a debt due to him from her, and further advances, not exceeding in the whole more than 400*l.*, and to hold the surplus for her separate use. C. D. afterwards made further advances, far exceeding the limit, part of which was paid upon bills drawn on him by A. B., with directions "to charge the same to the account of" her separate estate: Held, that C. D. was not entitled to appropriate his receipts, in the first place, in payment of the advances not covered by the security, the court considering that C. D.'s receipts could not be considered as indefinite payments; that he had them only for the purpose of paying off the charge, and afterwards for A. B.'s separate use; and that upon the true construction of the instruments C. D. was bound to apply the separate estate, which he received, in satisfaction of the charge, and could only consider the surplus, after such satisfaction, as subject to the disposition of C. D., or liable to such ordinary lien as he might acquire by advancing money to her. *Smith v. Smith*, 9 B. 80.

10. *Costs—Payment—"Special circumstances"—Taxation.*—The single fact that, upon a transfer of a mortgage, a mere draft bill of costs of the mortgagee's solicitor is, for the first time, produced and then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorize taxation after payment; nor is that fact sufficient, coupled with overcharges which are not so gross as to evidence fraud. The taxation (under the 6 & 7 Vict. c. 73) of a solicitor's bill, at the instance of a third party "liable to pay," is regulated by the relations existing between the solicitor and his client, and not as between the solicitor and such third party. *In re Fyson*, 9 B. 117.

11. *Privilege—Discovery—Demurrer of witness.*—A solicitor is not bound to disclose professional communications which took place between him and his client, although no litigation existed or was contemplated at the time. The same rule applies to similar communications between the solicitor and a third party, who acts as the medium of communication between the solicitor and client. A solicitor demurred to interrogatories seeking a discovery of communications between him and A. B., stating that in such communication he considered and treated A. B. as representing his client, and as being

the medium of communication between him and his client: Held, that he had brought the case within the rule as to protection. *Corymael v. Powis*, 9 B. 16.

12. *Service of notice of motion*—18th General Order of October 1842—*Practice*.—On the application of defendant's counsel, a motion stood over; when it came on again, it appeared that defendant had since changed his solicitor, but without order, and no counsel then appeared for him. The motion was granted on an affidavit of service. *Davidson v. Leslie*, 9 B. 104.

13. *Same*.—A party had some time since left home, and had not been heard of, and it was not known whether he was living or dead; his solicitor ceased to act for him, but no order had been made in changing solicitors: Held, that notices served on such solicitor were regular. *Wright v. King*, 9 B. 161.

And see RECEIVER, 10.

SPECIFIC PERFORMANCE.—*Loan of Money*.—Defendant representing that his estate was incumbered only to the amount of 18,000*l.*, borrowed that sum, agreeing to mortgage the estate as security, paying off the incumbrances out of the money. The lender's solicitor being very negligent, the mortgage was executed and great part of the money paid, when it was discovered that the incumbrances exceeded 30,000*l.*: Held, it was not too late to relieve the lender in equity. *Brown v. Stepney*, Beat. 588.

And see LESSOR AND LESSEE, 6, 7, 8; VENDOR AND PURCHASER, 1.

STAMP ACTS.—*Evasion*.—A clause in an agreement, providing that if it should become necessary to stamp it and to pay any penalty for that purpose, the creditor may charge it against the debtor, is an evasion of the stamp acts and the court will not enforce it. *Abbott v. Stratton*, 9 Ir. Eq. R. 233.

STAYING PROCEEDINGS.—1. *Practice*—*Two suits for same object*—*Costs*.—A party prosecuting a suit after notice of decree in another suit, under which he may obtain all the relief which he seeks in his own, may be refused his costs of an application to stay proceedings; but it is contrary to the practice to order him to pay such costs. Such application may be made by the plaintiff in the suit in which the decree has been made, if he have an interest in staying the proceedings, as well as by the defendant, although such plaintiff be not a party to the other suit. *The Earl of Portarlington v. Damer*, 2 P. 262.

2. *Same*.—Where the plaintiff's bill has been dismissed for want of prosecution, with costs, the defendant is entitled to stay him in another suit for the same object until the costs of the first suit are paid. The merits of the case cannot be discussed on the motion. *Montgomery v. Johnson*, 9 Ir. Eq. R. 221.

STAYING TRIAL. See ISSUE.

STOP ORDER.—*Practice*.—A stop order does not affect any right, and it is therefore unnecessary to specify that it is made "without prejudice." *Lucas v. Peacock*, 9 B. 177.

SUPERSEDEAS. See LUNACY, 9.

SUPPLEMENTAL BILL.—1. *Executors—Parties—Pleading.*—A suit was instituted by legatees whose interest (upon the happening of a contingency) might vest in the next of kin, against the executors alone. The next of kin were brought before the court by supplemental bill: Held, that the executors were not improper parties to such supplemental bill. *Parker v. Parker*, 9 B. 144.

2. *Liberty to file supplemental bill—Practice.*—Liberty to file a supplemental bill in the nature of a bill of review refused to a defendant on the ground that the defence sought to be introduced was originally within his means of knowledge and was inconsistent with the defence before relied on. *Blake v. Foster*, Beat. 461.

SURVIVORSHIP. See PORTIONS, 4; WILL, 6.

TAXATION. See SOLICITOR, 1—10.

TENANTRY ACT. See LESSOR AND LESSEE. TENANT FOR LIFE.

TENANT FOR LIFE.—*Renewal—Tenantry Act* (19 & 20 Geo. 3, c. 30)—*Laches.*—A lessee for lives renewable for ever settled his estate, making himself tenant for life. The lives dropped, and in 1809 the landlord brought an ejectment, to which the trustee took defence and which was abandoned. He then filed a bill against the tenant for life, only praying that he might be compelled to renew, or forfeit the estate, and obtained a decree on sequestration; in 1811 he was put into possession by injunction. Being himself lessee for lives, he had not renewed from previous to 1809, and his right to a renewal being disputed he obtained a renewal only after a suit in 1812. Early in that year the tenant for life died, and the parties entitled in remainder tendered the arrears of rent and sought a renewal, the fine being nominal: Held, they were entitled to a renewal, the delay being excused, and the decree in 1811 not operating as a demand under the Tenantry Act even if that act applied, which it was held not to do, there being no fine payable. *Armstrong v. Jessop*, Beat. 515.

And see INSOLVENT, 2. LESSOR AND LESSEE, 1, 2. MORTGAGE, 9.

TENANT IN COMMON.—*Liability of, to account to co-tenant*—*Stat. 4 Anne, c. 16—Executor.*—Whether one tenant in common of a farm, who has alone occupied and cultivated it, is liable, independently of contract, to account with his co-tenant for a moiety of the profits, *quære*. An executor, who had been tenant in common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right. *Henderson v. Eason*, 2 P. 308.

And see MORTGAGE, 9.

TIMBER. See WASTE, 2.

TITHES.—*Practice—Issues—Action—Different modes of ascertaining legal rights.*—A bill by vicar claiming, as such, a customary payment of 6d. in the pound on all lands and houses within the parish, was, on a rehearing, retained, with liberty to the plaintiff to bring an action; the Lord Chancellor considering that a more proper course than the one proposed to be taken by the court below, directing first an issue to try the immemoriality of the custom, and then taking the opinion of the court of law upon the validity of such a custom; the case being one in which the jurisdiction of this court was resorted to merely as ancillary to a legal right. Suggestion is to the propriety, in such cases, of going to law first to ascertain the right before filing the bill in this court. Neither party to an issue directed by the court is precluded, by going to trial, from afterwards appealing against the order by which it was directed. *Bulla v. Masters*, 2 P. 290.

TITLE. See PLEADING, 1.

TRUST—1. *Breach of trust—Duty of plaintiff in suit for, to prove other cestuis que trust.*—When one of several cestuis que trust institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own. *Williams v. Powell*, 2 P. 329.

2. *Breach of trust—Liability of trustee for reserving insufficient rent—Distinction between personal fraud and corruption, and omission or neglect of duty.*—A bill founded on an imputation of fraud and personal corruption will not warrant an inquiry, on that case being disapproved, whether there has not been neglect or an omission of duty. A trustee letting a farm originally at a proper rent will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety as between landlord and tenant, to obtain a higher rent. And, *semble*, that rule would be applicable even to a case in which the tenant was a near relation to the trustee, unless there were some other circumstances to confirm the suspicion of personal favour which that relationship is calculated to excite. *Ferraby v. Hobson*, 2 P. 255.

3. *Declaration of trust in agreement—Statute of Frauds—Effect of repudiation of trust by trustee.*—A. and B., for whom land had been purchased by C. with a view to its being resold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of an agreement between them relative to the land, by which it was agreed that they should each advance half the purchase money and receive interest on the same at five per cent., and that they were to have each one-third interest in the purchase, and to reserve one-third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the lands in lots, or any other services that might be

required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for. The land having afterwards greatly increased in value, A. and B. refused to recognize C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected from the first to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the court being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the court the discretion which they had by the memorandum reserved exclusively to themselves, as to the time of sale, declared C. entitled to one-third, and referred it to the Master to enquire whether it would be for the benefit of all parties that the land should be sold. *Dale v. Hamilton*, 2 P. 266.

4. *Invalid contract between trustees—Corporation—Hospital.*—A hospital having a corporate character was established in close connection with a municipal corporation. The ex-mayor was to be the governor, the masters and assistants were elected from the corporation, and the mayor and aldermen were visitors: Held, that the corporation and hospital were, in equity, incapable of contracting, and a purchase by the corporation of property belonging to the hospital was set aside. *Att. Gen. v. The Corporation of Plymouth*, 9 B. 67.

5. *New trustee, appointing on petition*, 1 Will. 4, c. 60, s. 22.—The court may appoint a new trustee on petition, under 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees. *In re Foxhall*, 2 P. 281.

6. *New trustees—Refusal to appoint.*—By marriage settlement a judgment was vested in trustees; and it was declared that if the wife should, with the consent of her husband, think it advisable to call in the sum secured thereby, the trustees were to permit her to use her discretion as to the re-investment of same. One trustee died; the other was out of the jurisdiction. The wife, with the consent of her husband, called in the money, and she and her husband assigned the judgment to a third person, who advanced the money, but the surviving trustee refused to execute the assignment and desired to be discharged from the trusts. The court thinking that the real object of the parties was, not to continue the money in settlement, but, under colour of the power, to get it out of settlement, refused to appoint new trustees. *In re Molony*, 2 J. & L. 391.

7. *Public trust—Deed—Construction—Vendor and purchaser.*—The statute of the 27 Eliz. c. 20, authorized the corporation of Plymouth to construct a watercourse or conduit, for bringing a supply of fresh water from a distance to Plymouth, for public objects, as for the supply of the ships and town, and to scour the haven. Mills were erected on the watercourse, and the corporation afterwards conveyed away a portion of their interest in the leat: Held, that the

corporation had undertaken the performance of a public trust, and could not divest themselves of the means of fully executing it; that the primary duty of the corporation was to provide for the public objects contemplated by the act; and that the surplus water only, after satisfying the public purposes, could be applied to the use of the mills. The court also considered it to be doubtful whether the corporation could alienate the watercourse, or any part, for satisfying their own debt. Upon the construction of the particular instruments, held, that by the conveyance of one fourth "of and in the leat or watercourse," the purchaser acquired no interest in the water, other than such part as remained after supplying the public purposes for which the leat was authorized to be made. *Att. Gen. v. Corporation of Plymouth*, 9 B. 67.

8. *Solicitor—Trust to secure costs—Enforcing.*—P. being indebted to I. G. in 3000*l.*, and Sir G. G., the father of I. G., being indebted to T. and H. in 1000*l.*, for recovery of which they had instituted an action at law against him; an arrangement was entered into, part of which was, that the action against Sir G. G. should be discontinued, and that P. should pay the costs of it; and P., pursuant to the agreement, mortgaged his estate for 1400*l.* to a trustee, upon trust inter alia to secure to S., the attorney for T. and H. in the action, the costs of the plaintiffs in that action, to be paid as therein mentioned. S., though named in the declaration of trust, was not a party to the arrangement: Held, that he was not entitled, as a cestui que trust under the deed, to institute a suit to carry the trusts of it into execution; and that, having done so, the objection might be taken by any party to the suit. The principle of *Garrard v. Lord Lauderdale* (2 R. & M. 451) not to be extended. *Gibbs v. Glamis* (11 Sim. 584) observed upon. *Simmonds v. Palles*, 2 J. & L. 489.

And see INTEREST, 2. LUNACY, 10.

VACANCIES. See CHARITY, 3.

VENDOR AND PURCHASER.—1. *Agent and principal—Agreement for sale—Specific performance.*—A principal agreed to sell part of his estate to his agent, being ignorant at the time that the agreement included the only turf bog on the entire estate, there being no concealment or apparently any knowledge of that circumstance by the agent. The agent, who was named a trustee for sale in his will, gave assistance to his co-trustees, and did not insist on the agreement for nearly a year after the death and after the estate was advertised for sale: Held, that the first circumstance would be a ground to refuse specific performance; and the latter was a virtual abandonment of the agreement. The letters which contained the agreement showed the vendor's object was to sell to pay his debts in his lifetime. *Semble*, this would be no objection to a specific performance after his death, the agreement being in other respects precise. *Chambers v. Betty*, Beat. 488.

2. *Contract of sale—Rectifying contract after execution, on ground of mutual mistake.*—Premises were sold for the residue of a term, of

which both parties at the time supposed that eight years only were unexpired, and the price was fixed expressly on that supposition. It afterwards appeared that twenty years were in fact unexpired at the time of the sale. But a bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed. *Okill v. Whittaker*, 2 P. 338.

3. *Notice—Conveyance by person entitled in several rights—Registry—Lis pendens.*—The defence of a purchase for value without notice is not available against a covenant to renew, or other equitable claim under a prior registered instrument. A. conveyed lands to a trustee on trust to pay his debts. The deed was registered, but before it was acted on, A. made a lease with covenant for renewal, which was also registered. The lands were sold in an administration suit by a judgment creditor of a deceased owner. The purchase money was paid into court, and the balance paid to the trustee, who joined in the conveyance. A. had not been served with subpoena, or appeared till after the date of the lease. In a suit, instituted after a great lapse of time, for renewal by the representative of the lessee against the representative of the purchaser, insisting that the trust deed was voluntary and revocable, and that the sale in the suit did not affect the lease: Held, that the purchaser having got a prior legal estate under the trustee, and the equitable estate free from payment of the prior incumbrances, was not bound to renew, especially after such a time had passed, without recognition of the plaintiff's rights. A person, joining in a conveyance of all his estate, &c. in one right, transfers to the purchaser all the title he has in any other right. *Semble*, a suit is *lis pendens* before service of subpoena, and a general administration suit is *lis pendens* as to lands ultimately sold in it (though it did not seek to enforce a specific claim against them), so as to avoid a lease by the inheritor after its institution. The plaintiff claimed under a renewable lease of 1782 lands then let under a prior lease subject to the same rent. The prior lessees remained in possession till their lease expired in 1839, paying the rent directly to the head landlord. The lessee of 1782 neither received or paid rent, but was served with an ejectment begun by the landlord in 1833. *Semble*, his rights were barred by the statute of limitations. *Drew v. Lord Norbury*, 9 Ir. Eq. R. 171.

And see LIEN. PRINCIPAL AND AGENT, 2. TRUST, 3, 7.

VESTING. See CONVEYANCE, 1. PORTIONS, 3, 5. WILL, 10.

VICE-CHANCELLOR. See JURISDICTION.

VOLUNTARY SETTLEMENT.—1. *Distinction between voluntary settlement and voluntary conveyance to pay debts.*—Distinction between voluntary settlements, where the object of the donor is bounty, and voluntary conveyances in trust to pay debts to which the creditors are not parties. *Simmonds v. Palles*, 2 J. & L. 489.

2. *Marriage articles—Proviso to settle lands.*—By marriage articles, reciting the lady's fortune to be 1000*l.*, the husband agreed to settle 4000*l.* secured by his bond and judgment, with a proviso that it should be void if he should afterwards settle lands to the value of 100*l.* a

year. He did subsequently settle lands to a value considerably beyond 100*l.* a year. The lady's friends had given her an additional sum of 1000*l.* On a bill filed under the former Bankrupt Act (in *pari materia* with the statute of fraudulent conveyances): Held, that the settlement could not be impeached as voluntary as to the excess beyond 100*l.* a year. *Maguire v. Nicholson*, Beat. 592.

WAIVER. See ANNUITY, 1. LESSOR AND LESSEE, 6.

WASTE.—1. *Injunction—Open quarries—Mines.*—A tenant for lives, renewable for ever, having demised for years part of the lands upon which there was at the time an open quarry, which he was in the habit of working for sale, without any reservation or exception in the sublease: Held, the subtenant was not entitled to work the quarry for sale, and that his landlord had the right to enjoin him. There is no analogy between open quarries and mines. *Mansfield v. Cramford*, 9 Ir. Eq. R. 271.

2. *Injunction—Timber acts.*—The Irish society in 1618 granted lands to the Fishmongers' Company, reserving the timber. By deed of 1741, the society declared they would not claim trees thereafter planted, but that the company might cut them, so as they should be first applied in the improvement of the estate. In 1747 the company demised to a lessee, excepting the trees, with liberty to themselves to cut them for the improvement of their estates, according to their interest, but not for sale. He cut for sale: Held, that neither the nature of their title nor the timber acts were any objection to a suit by the company for an account and injunction. A bill by a landlord for an account of waste, in cutting timber, by a tenant in his lifetime, lies against the tenant's executors. But where the waste had been committed for fifty years during the tenant's life, and the bill was not filed till a few years after his death, the account was refused as to all the waste in his lifetime, but granted with an injunction as to waste by the executors. *Fishmongers' Company v. Beresford*, Beat. 607.

And see INJUNCTION, 3.

WILL.—1. *Bequest of plate—Life use.*—Bequest of the use of plate, with power to dispose of such portion thereof as the legatee might think proper, preceded by an absolute gift of other chattels to the same person: Held, to give a life interest only in the plate, with a power of disposition over part of it. *Espinasse v. Luffingham*, 9 Ir. Eq. R. 129.

2. *Charge on real estate.*—A testator gave legacies, and charged his executors, to whom he devised real and personal estate, with the payment thereof: Held, that the legacies were charged on the real estate. *Cross v. Kennington*, 9 B. 150.

3. *Estate tail.*—A testator devised lands to his son A. and his heirs for ever, and in case A. should die without lawful issue, desired that, after his death, all the property should go to his daughter and her heirs; and in case both A. and the daughter should die without lawful issue, desired the property should go to his brothers: Held, an estate tail in

A., and not a fee-simple, with an executory devise over. *Jones v. Ryan*, 9 Ir. Eq. R. 249.

4. *Exoneration of personal estate*.—A testator gave his estates, real and personal, in Ireland, after payment of all his just debts, funeral and testamentary expenses, on trust, chiefly for the use of a cousin. He gave all his real and personal property in England to such uses as his widow should appoint, and in default of appointment, to her for life, with remainder to the same uses as his freehold estates in Ireland. Provided that, if his personal estates in Ireland should be insufficient for payment of his debts and legacies, the same should be charged on his freehold and leasehold estates in Ireland, and he exonerated his real and personal estates in England therefrom. The testator died in England: Held, that his funeral and testamentary expenses in England were charged, as well as his Irish testamentary expenses, on his Irish estates, in exoneration of the English personalty. *Coote v. Coote*, 9 Ir. Eq. R. 197.

5. *Future illegitimate children*.—Bequest of a sum of money to a trustee in trust to pay to A. N. the interest during her life, or until she married, for the support of her children, W. and R., and in case of her death or marriage, to apply it to the use of her children; and on their coming to the age of twenty-one, to divide the said sum between them. The children of A. N., born after the date of the will, and in the lifetime of the testator, do not take under this bequest. *Semble*, a bequest to future illegitimate children is void; and there is no distinction between illegitimate children described as the children of a particular mother, without reference to their paternity, and those who are described as the children of a particular father. *In re Connor*, 2 J. & L. 456.

6. *Gift to children—Survivorship*.—In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take, and the contingency to which the survivorship refers, is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument. *Bouverie v. Bouverie*, 2 P. 349.

7. *Guardian—Ward—Words of "recommendation"*.—Words of recommendation or desire in a will, will not raise a trust, if such construction would conflict with other provisions of more definite and positive import in the same instrument; but the court will give such effect to them as may not be inconsistent with those provisions. A father having by his will appointed a guardian to his children, with a recommendation, that in the event of their mother's death during their minorities, they should be placed under the care of two female relations: Held, on a contest between those ladies and the testamentary guardian, in reference to the management of the children after the mother's death, that the court was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence and control

over the children and their fortunes, which, by virtue of his office, it was his right and duty to exercise. *Knott v. Cottes*, 2 P. 192.

8. *Interest on legacy*.—Interest on legacies is given for delay of payment, and, consequently, until the day of payment arrives, no interest is, in general, demandable. When a legacy is given by a parent to his child, interest is allowed thereon, by way of maintenance, though the day of payment has not arrived. But the rule does not apply when the testator has, by his will, made a provision for the child's maintenance. *Donovan v. Needham*, 9 B. 164.

9. *Lost will—Evidence—Costs*.—Upon the admission of the heir-at-law, that the will of the testator, which was lost, was duly executed and attested; and that thereby certain lands were devised to him, subject to a perpetual rent charge; and upon evidence of the contents of the will, by two witnesses who heard it read, but could not state that it was executed and attested as by law required, further than that the person reading it read out the names of the testator and of certain persons, as if they had executed and attested it; and upon proof of the payment of the rent-charge for thirty-five years up to the year before the filing of the bill, the court declared that the lands were well charged with the annuity, and that the heir-at-law, and the persons deriving title with notice under a settlement of the lands executed by him, on the marriage of his son, and duly registered, and also the judgment creditor of the heir-at-law, were bound to give effect to the devise of the rent-charge. *Wise v. Wise*, 2 J. & L. 603.

10. *Vesting—Payment*.—A testator gave his real and personal estate after paying four annuities, to one for life, and after his death, he directed his personal and the produce of his real estate to be divided amongst the children of A. living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not, then his trustees were either to invest it and pay and apply the residue of the income in the maintenance, &c. of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares. There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share became payable. One of the children predeceased an annuitant: Held, nevertheless, that the bequest was vested, and that the gift over did not take effect. *Butterworth v. Harvey*, 9 B. 130.

And see APPORTIONMENT. CONTRIBUTION. CONVEYANCE, 1. ELECTION, 1, 2. PORTIONS, 1, 3.

WITNESS.—1. *Practice—Examination of defendant*.—The statute of the 6 & 7 Vic. c. 85, has not altered the practice in relation to the examination of a defendant by the plaintiff, and the order cannot be obtained to examine a defendant whose answer has been replied to unless the replication be withdrawn as against him. *Walker v. Tully*, 9 Ir. Eq. R. 261.

2. *Practice—Examination of defendant—Suppression of depositions*.—The statute 6 & 7 Vic. c. 85, has made no alteration in the previously

existing practice of courts of equity, which required a rule or order of court to be had previously to the examination of a party in the cause. The proper time to move to suppress depositions for irregularity is after publication has passed. *Dobbyn v. Adams*, 9 Ir. Eq. R. 275.

3. *Practice—Examination of insolvent plaintiff by assignees in supplemental suit.*—The rule that a plaintiff cannot be examined as a witness in the cause is an absolute rule of practice, not depending on the question, whether in the particular case he may or may not be liable to costs. *Fisher v. Fisher*, 2 P. 236.

4. *Practice—Order to examine witness de bene esse.*—An order for liberty to examine a witness de bene esse will be made without notice, where the witness is of advanced age. *Scott v. Scott*, 9 Ir. Eq. R. 261.

BANKRUPTCY.

Containing cases in 1 De Gex, Parts 1 and 2.

ACT OF BANKRUPTCY.—1. Composition deed, when not a sale for value, but an act of bankruptcy—What an assent thereto—Reputed ownership.—By a composition deed between A. and B. in scheduled creditors of A., after reciting that it had been agreed that A. should pay the creditors 10s. in the pound; and after reciting that B. had agreed to join in the deed, for the purpose of better securing payment of the composition, on having such an assignment made to him as was thereafter contained, it was witnessed, 1. That A. and B. covenanted to pay the creditors the composition; 2. That in consideration of this covenant, A. assigned all his stock in trade, machinery and effects to B., to hold as B.'s own goods and chattels; 3. That the creditors covenanted on receiving the composition to release A. Contemporaneously with this deed, the leasehold trade premises were assigned by A. to B. with the privity of the creditors. At the time of the execution of the deed all the assigned property was in the possession of certain mortgagees of the leasehold premises and machinery, who afterwards gave up possession to B. on his guaranteeing payment of the mortgage money. Immediately after the execution of the deed, B. gave the creditors his promissory note for the amount of the composition. B. remained in possession till he became bankrupt, and after his bankruptcy a fiat was sued out against A. by a creditor who knew of the deed though he had not executed it. He was a friend of A., and indifferent to the payment of his debt, but permitted his name to be used by the creditors who had signed the deed, for the purpose of suing out the fiat: Held, 1. That the composition deed was an act of bankruptcy, and not a sale for value; 2. That the assigned property was not in the reputed ownership of B.; 3. That the circumstances under which the fiat was sued out against A. did not prevent A.'s assignees from recovering the property. *In re Marshall*, 273.

2. Fraudulent delivery.—Payment of a debt by cheque may be fraudulent preference. When such payment was made without pressure, after a resolution had been come to by the debtors to suspend payment of their debts generally, it was held, under the circumstances of the case, a fraudulent preference, whether the debtors contemplated actual bankruptcy or not. *Ex parte Simpson*, 9.

3. Lunatic.—*Semble*, that a lunatic cannot commit an act of bankruptcy by omitting to pay or give security. *Ex parte Stamp*, 345.

ACQUIESCENCE. See CONTEMPT, 1.

ACTION. See CONTEMPT, 1, 2.

ADVERTISEMENT. See OFFICIAL ASSIGNEE.

AFFIDAVIT OF DEBT.—*Taking off file.*—Affidavit of debt filed under 1 & 2 Vict. c. 110, s. 8, ordered to be taken off the file with the creditor's consent. *Anonymous*, 334.

And see FIAT, 5.

AGENCY EXPENSES. See ASSIGNEES, 4.

AMENDMENT. See FIAT, 1.

ANNUITY.—*Valuation of, for purpose of set-off.*—Assignees who had brought an action against an annuity creditor of the bankrupt on a cross demand, were, on the petition of the creditor, submitting to the jurisdiction of the court, restrained from proceeding in the action. *Semble*, that the commissioner has no jurisdiction to value the annuity for the purpose of its value being set off in an action. *Ex parte Law*, 378.

ANNULLING. See FIAT, 2—5. OFFICE FEES, 1—4.

APPEAL.—*Petition to Lord Chancellor—Injunction.*—On a petition to the Court of Review for an injunction to restrain an action in which the plaintiff has demurred to the plea, the court makes a qualified order, restricting the plaintiff as to the grounds of demurrer. On appeal, this order is discharged, and the respondents presented a petition to the lord chancellor for an unqualified injunction: Held to be an original petition, which ought not to be presented to the Lord Chancellor, and dismissed with costs. *Ex parte Van Sandau*, 303.

And see CONTEMPT, 1. INSOLVENT.

ASSIGNEES.—1. *Opening assignees' accounts—Taxation.*—Examinations before the commissioner cannot be read as evidence on a petition. Where the solicitor to the fiat received and paid all monies on account of the estate, and at the audit the accounts were verified by his affidavit as to their accuracy, and the affidavit of the assignees that they had neither received nor paid anything except what had been so received and paid by the solicitor; but there was nothing to show that either of the assignees had either as to information or belief verified the accuracy of their accounts: Held, that the accounts ought to be opened and retaken, although three years had passed since the audit. The retainer by the solicitor under such circumstances of the amount of his bill of costs as taxed by the commissioner, and the allowance of such retainer at the audit, held no such payment of the bill as to preclude retaxation. Whether the commissioner has jurisdiction to open accounts audited and passed by commissioners under the old jurisdiction, *quære*. *Ex parte Rees*, 205.

2. *Buying in without order.*—Where an assignee bought in without an order, he was ordered to make good the loss occasioned by a resale. *Ex parte Gover*, 349.

3. *Choice of, trustees proving against co-trustee cannot vote at.*—Where one of several trustees of a charitable society became bankrupt, and his co-trustees tendered a proof for the amount due from him to the charity, and on the commissioner refusing to admit the proof without an order of court, an order was obtained and the debt proved by the co-trustees in pursuance thereof: Held, that the co-trustees were not creditors entitled to vote at the choice of creditors' assignees, and they having been the only persons voting, the choice was set aside, and a new one directed. *Ex parte Rome*, 111.

4. *Expense of agency under composition deed allowed to assignees under circumstances.*—Trustees under an assignment for benefit of creditors employ an agent to proceed to America to recover part of the assigned property. Afterwards the debtors become bankrupt, and three of the trustees are appointed assignees: Held, that under the circumstances of the case the assignees ought to be allowed in their accounts the expense of employing the agent. For the purpose of bringing expenses within the description of just allowances, it is not necessary to show that they have actually benefited the estate, if there was a fair probability of their so doing. *Ex parte Shaw*, 242.

5. *What passes to—Personal earnings of uncertificated bankrupt.*—On a petition for the appointment of a new trustee in the place of the bankrupt, and that the new trustee might use the bankrupt's name in certain proceedings, the petitioner was ordered to pay the costs of the bankrupt and the assignees to them respectively. The bankrupt, who was a solicitor, and acted for himself in the matter of the petition, had not obtained his certificate: Held, that the costs ordered to be paid to the bankrupt belonged to him, and did not pass to the assignees. *Ex parte Grimstead*, 72.

And see SOLICITOR.

BANKERS. See FRIENDLY SOCIETY. PROOF, 1.

BANKRUPT.—1. *Examination—Adjournment sine die.*—Where a bankrupt was examined before the commissioner respecting a book which the bankrupt stated that he had destroyed, the commissioner thinking, upon evidence produced before him, that the book had not been destroyed at the time stated by the bankrupt, adjourned the examination sine die, the court directed the examination to proceed. *Ex parte Gibbs*, 1.

2. *Expenses on changing venue of fiat.*—Bankrupt allowed his expenses arising from changing the venue of the fiat after adjudication. *Ex parte Cheeseborough*, 333.

And see ASSIGNEES, 5.

BILL OF COSTS. See PROOF, 2. SOLICITOR, 1, 2.

BILL OF EXCHANGE. See PROOF, 2.

BREACH OF TRUST. See PROOF, 3, 4.

CHANGING VENUE. See **BANKRUPT, 2.**

CHOICE OF ASSIGNEES. See **ASSIGNEES, 3.**

CLERK.—*Salary of—Three months' payment.*—A trader borrowed 580*l.* under an agreement, by which the lender was to become his clerk at a salary of 222*l.* 10*s.* a year; the trader agreed to produce his accounts and balance sheet to the lender, who was to get in the debts, and alone to draw the cheques on the banking account. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bankrupt: Held, first, that the lender was a clerk, entitled to three months' payment in full; secondly, that the circumstance of the clerk having been absent from business, owing to ill-health, for three months immediately preceding the bankruptcy, with the bankrupt's sanction, did not take away the right. *Ex parte Harris*, 165.

CONFIRMATION.—*By commissioner, of conveyance in fee by bankrupt tenant in tail before bankruptcy.*—Where a trader sold an estate, and conveyed it as tenant in fee simple, with the usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the commissioner should be at liberty to execute a deed of confirmation to purchaser. *Ex parte Fripp*, 293.

COMMITMENT. See **CONTEMPT, 1, 2.**

COMPOSITION DEED. See **ACT OF BANKRUPTCY, 1.**

CONTEMPT.—1. *Commitment for—Appeal—Petition—Acquiescence in commitment—Form of order of commitment—Injunction.*—1. *Quære*, whether a commitment by the Court of Review for contempt can be the subject of appeal. 2. An appeal from a series of orders of the Court of Review permitted under the circumstances to be by way of petition. 3. An apology, and petition to be discharged from custody and other proceedings, by a party committed for contempt under the order of commitment, and the consequential orders, held not to exclude the party committed from disputing the validity of the commitment. 4. An order of commitment should contain an express adjudication that a contempt has been committed. 5. Where such an order recites the petition on which it is made, and refers to a printed paper as being set out in the schedule to the petition, and then recites that the schedule to the petition is in the words and figures following, and sets out the printed paper, and then orders the party to be committed for his contempt in printing and publishing the aforesaid printed paper so set out as aforesaid in the said schedule to the said petition, *quære*, whether the order contains a sufficient adjudication that a contempt has been committed? 6. The circulation of a libel on a court, relating to a matter disposed of by an order still in minutes, is a contempt for which the court may commit. 7. One judge of the Court of Review, sitting as the court,

may commit for contempt. 8. In an action for the imprisonment under the commitment, the order is pleaded, and the plaintiff demurs: Held, that an injunction ought not to issue limiting the plaintiff as to the particulars in respect of which he might on such demurrer question the validity of the order. *Ex parte Van Sandau*, 55.

2. *Irregular order of commitment—Damages.*—1. Although an order of commitment should contain an express adjudication that a contempt has been committed, the want of an express adjudication is not sufficient ground for discharging the order. 2. Such an order may direct the party committed to pay the costs of the party complaining, but not his costs, charges and expenses. 3. When the party complaining obtained a warrant for the apprehension of the party ordered to be committed, and delivered it to the officer, by whom it was executed, and afterwards the party committed was discharged on his own application, and various orders were made founded on the commitment, and it afterwards appeared that the warrant by an oversight was not sealed: Held, that the commitment was invalid; that the consequential orders ought to be discharged; and that the party committed was entitled to recover damages from the party obtaining the process. *S. C.* 303.

3. *Jurisdiction of Court of Review to issue an injunction.*—The Court of Review has jurisdiction to restrain a party committed by it for contempt from questioning, in an action at law, the regularity, propriety, or form of the order of committal. *Ex parte Turner*, 30.

CONTINGENT DEBT. See PROOF, 5.

CONVEYANCE. See CONFIRMATION.

COSTS. See FIAT, 5. SOLICITOR, 1, 2. SURRENDER.

COURT OF REVIEW. See CONTEMPT. INSOLVENT.

DAMAGES. See CONTEMPT, 2.

DIVIDEND STAYED. See PROOF, 6, 7.

EQUITABLE MORTGAGEE. See ORDER FOR SALE.

EVIDENCE. See PETITION.

EXAMINATION. See BANKRUPT, 1. PETITION.

EXPENSES. See BANKRUPT, 2.

FIAT.—1. *Amending, where one bankrupt died before adjudication.*—Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name. *Ex parte Hall*, 332.

2. *Annulling—Bankrupt's petition to annul before surrender.*—Petition of bankrupt to annul the fiat heard, although he had not surrendered, the time for his surrendering having expired between the presentation of the petition and the hearing. *Ex parte Hodson*, 374.

3. *Annulling—Bankrupt's petition to annul before surrender—Insolvent Act.*—Non-surrender by the bankrupt is no objection to his petition to annul the fiat, if the petition be presented before the

time for surrendering has expired. The circumstances that the bankrupt has taken the benefit of the Insolvent Debtors' Act, and that the petitioning creditor's debt was included in the schedule, held insufficient ground for annulling the fiat. *Ex parte Garnett*, 95.

4. *Annulling—Consent by bankrupt to advertisement no acquiescence in fiat.*—Consent by bankrupt to the insertion of the advertisement forthwith, held no acquiescence in the validity of the fiat. *Ex parte Gould*, 29.

5. *Annulling—Particulars of demand in affidavit of debt—Acquiescence—Setting off costs of petition against debt.*—1. An affidavit of debt, filed as the foundation of an act of bankruptcy, stated the demand to be for goods sold and delivered, but by the particulars of demand the greater portion of the debt was stated merely as due on bills of exchange, which, however, it afterwards turned out, were given in respect of goods sold and delivered: Held, that the proceeding was irregular, and an insufficient foundation for an act of bankruptcy. 2. The debtor, on being served with the summons, called on the creditor's solicitor, and saw his clerk, at whose instance the debtor signed a memorandum, promising to pay at a certain time, or that if he did not the creditor might proceed on the summons. The debtor was attended by no solicitor on his behalf, and was not aware of the irregularity in the proceedings: Held, that neither the signature of the memorandum, nor his failure to attend the summons, prevented his impeaching the irregularity of the proceedings, but that the fiat ought to be annulled with costs. 3. *Quære*, whether it can be made part of the order that the creditor should set off his debt against the costs, and whether any consideration of the lien of the debtor's solicitor would prevent such an order being made. *Ex parte Greenstock*, 230.

6. *Misdescription in fiat.*—A bankrupt's usual place of business for two years before the bankruptcy had been at Hounslow, but he had taken for his family a house at Durdham Down, near Bristol, where he had resided for some months previous to his bankruptcy, and contracted debts. A Bristol fiat, describing him as of Durdham Down, and naming him Clarke instead of Clark, was transferred to the London court, to which a fiat with correct description had been issued, and the proofs were ordered to be transferred, the Bristol fiat being impounded. *Ex parte Burbidge*, 256.

7. *Same.*—Description of a bankrupt as of a particular parish in a particular county held sufficient, although the parish was partly in that county and partly in another, and the bankrupt's shop was in the other, an affidavit being produced of there being no other person of the same name and trade in the parish. *In re Woodhead*, 99.

8. *Opening fiat—Petitioning creditor's debt secured by forged instrument no objection to opening fiat—Transfer of fiat to another commissioner.*—At the sitting for opening the fiat it appeared that, for securing the petitioning creditor's debt, the trader against whom the fiat was issued gave a promissory note, which there were grounds for believing was forged. No prosecution having been

instituted, the commissioner declined proceeding with the fiat. On the petition of the petitioning creditor, the court ordered the fiat to be transferred to another commissioner and proceeded with. *Ex parte Hind*, 161.

9. *Trading—Validity of bankrupt's own fiat sued out after he has ceased trading—Creditor cannot petition to annul fiat for want of trading, after successfully opposing bankrupt's discharge under Insolvent Act on ground of trading.—Semble*, a man who has ceased to trade cannot sue out a fiat against himself unless he owes a debt contracted during the trading, which would support a creditor's fiat. A creditor who has successfully opposed an application by an insolvent for relief, under 5 & 6 Vict. c. 116, on the ground that he is a trader, cannot afterwards petition to annul a fiat sued out by the insolvent himself for want of trading. *Ex parte Mitchell*, 257.

FORGERY. See **FIAT**, 8.

FRAUDS, STATUTE OF.—Conversion of separate into joint demand by parol.—A parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being a promise to answer a debt of another within the statute of frauds, but the creation of a new debt, in consideration of the former being extinguished. *Ex parte Lane*, 300.

FRIENDLY SOCIETY.—Bankers—Officers.—The rules of a friendly society provided that the treasurer retaining upwards of 10l. more than seven days after he was required to pay it over should be excluded from the society. They also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers: Held, that the bankers for the time being were not officers, so as upon their bankruptcy to entitle the society to payment in full. *Ex parte Harris*, 162.

INJUNCTION. See **APPEAL**. **CONTEMPT**, 1.

INSOLVENT.—Appeal to Court of Review.—On an application by an insolvent for a final order, under 7 & 8 Vict. c. 96, s. 6, the commissioner remanded the insolvent (who had previously been discharged under the act) on the ground of his having recently petitioned the Insolvent Debtors' Court, and that proceedings were pending there: Held, that there was no appeal to the Court of Review from this order. *Ex parte Newlands*, 150.

And see **FIAT**, 2.

INSPECTION OF DEED. See **SOLICITOR**, 4.

JOINT ESTATE. See **PROOF**, 3, 9.

JOINT STOCK COMPANY.—Form of order in Chancery in case of bankrupt joint stock company.—Form of order in Chancery, under the act 7 & 8 Vict. c. 111, s. 20, for winding up the affairs of a bankrupt joint stock company. *Re Forth Marine Insurance Company*, 335.

LIEN. See **SOLICITOR**, 4.

LIMITATIONS, STATUTE OF. See SOLICITOR, 2.

LUNATIC. See ACT OF BANKRUPTCY, 3.

MARKET GARDENER. See TRADING.

MISDESCRIPTION. See FIAT, 6, 7.

NOTICE. See REPUTED OWNERSHIP, 2, 3.

OFFICE FEES.—1. *Annulling fiat without payment of the 10l. and 20l. office fees—Certificate of commissioner.*—On a petition to annul a fiat with consent of creditors, the commissioner declined to certify the consent without payment of the office fees of 10l. and 20l. Assignees had been chosen, but it was stated that there were not, and were not likely to be, any assets. The court requested the commissioner to certify his opinion whether there were any available assets. *Ex parte Davis*, 267.

2. *Same.*—Where a bankrupt sued out a fiat against himself, and only one creditor proved, and assignees were chosen, but there were no assets, and the office fees of 10l. and 20l. had not been paid, the court refused to dispense with the usual certificate of the commissioner, on an application to annul with the consent of the creditor. *Ex parte Nicholls*, 331.

3. *Same.*—On a petition of the bankrupt, with the consent of all the creditors who had proved, to annul the fiat, the commissioner refused to sign the requisite certificate unless the fees of 20l. and 10l., payable under 1 & 2 Will. 4, c. 56, ss. 46 and 55, were paid. There were no assets. The fiat was ordered to be annulled on the registrar being satisfied of the concurrence of the creditors. *Ex parte Diamond*, 143.

4. *Same.*—On the bankrupt petitioning to annul the fiat with the consent of the creditors, and commissioner's refusing to sign the certificate until the above fees and the fees of 10l. and 20l. payable under the same act (ss. 46 and 55) were paid: Held, that the fiat ought to be annulled on payment out of the fund realized of the expenses, and a proper remuneration of the official assignee, to be ascertained by the commissioner. *Ex parte Miller*, 144.

5. *Choice of assignees, what a sitting for—As to office fee of 1l.*—A meeting and an adjourned meeting was held for the choice of assignees, but none were chosen: Held, that the payment of 1l., directed by 1 & 2 Will. 4, c. 56, s. 55, to be made for every sitting other than any sitting for the choice of assignees, &c. was not due on either of the above sittings. *S. C. ib.*

6. *Refunding after fiat annulled.*—Where a bankrupt sued out a fiat against himself, which was annulled, and no creditors' assignees had been chosen, the office fees of 10l. and 20l. paid by him into the bank were ordered to be returned. *Ex parte Reynolds*, 373.

7. *Refunding—Assets insufficient to pay petitioning creditor's costs.*—Where the sums of 20l. and 10l., directed to be paid by 1 & 2 Will. 4, c. 56, ss. 46 and 55, had been paid out of an estate which was insufficient to pay these sums and the petitioning creditors' costs

up to the choice, the Lord Chancellor refused to order the payments to be refunded to the petitioning creditors. *Ex parte Hopkins*, 204.

8. *Solicitor's bill*—*Application of 10l. and 20l. office fees in payment of*.—Under the bankrupt's own fiat, there being no probability of any choice of creditors' assignees, and the office fees of 10l. and 20l. having been paid to the accountant-general: Held, that they might be applied in payment of the bill of costs of the bankrupt's solicitor. *Ex parte Buchanan*, 344.

9. *Solicitor's bill paid without reservation of office fees of 10l. and 20l.*—Where an official assignee had been appointed, but although three meetings had been advertised for the choice of assignees no creditor attended, and the bankrupt past his last examination: Held, that the bill of the solicitor to the petitioning creditor was payable out of the assets realized, although there would not then remain any fund to pay the 10l. and 20l., made payable by the 1 & 2 Will. 4, c. 56, ss. 46 and 55, the bankrupt having obtained his certificate, and an affidavit being made of there being no probability that any creditor would come in and prove. *Ex parte Teague*, 140.

10. *Same*.—Bill of solicitor of bankrupt suing out a fiat against himself, under which no assignees were chosen, ordered to be paid out of the fund in the hands of the accountant-general, without making any reserve for the office fees of 10l. and 20l. The accountant-general ought not to be served with the petition for payment. *Ex parte Jerwood*, 373.

11. *Same*.—Where under a fiat sued out by the bankrupt himself three meetings had been advertised for the choice of assignees, but none had been chosen, and at the last of the meetings the choice was adjourned sine die: Held, that the bill of costs of the bankrupt's solicitor, amounting to 36l. 1s. 6d., was payable out of the assets in hand, amounting to 37l. 11s. 7d., after payment of the messenger's costs, (the official assignee waiving any remuneration,) without any reservation being made in respect of the office fees of 20l. and 10l. *Ex parte Patterson*, 158.

OFFICERS. See FRIENDLY SOCIETY.

OFFICIAL ASSIGNEE.—1. *Defaulter*.—In the case of a defaulting official assignee, the court ordered that no sum should be paid in respect of monies due to him in any bankruptcy until he had made good all the amounts due from him in other bankruptcies. *Ex parte Graham*, 328.

2. *Duty in calling for old accounts*.—Where there had been no audit of the assignees' accounts, and large sums had been received by them, it was held that the official assignee acted properly in calling for an audit, although twenty-five years had elapsed since any step had been taken, and no creditor made any complaint; but the court being of opinion that the official assignee might, with little difficulty and at a small expense, have satisfied himself that the circumstances did not render it incumbent upon him to continue to prosecute a claim against the creditors' assignees, he was not held entitled to his

full costs as against the latter, there being no estate. *Ex parte Shaw*, 242.

3. *Right of official assignee to appear separately.*—Where, upon an equitable mortgagee's petition, the mortgagee and the creditors' assignees appeared by the same solicitor, the court ordered the sale to be conducted as the commissioner should think fit, having regard to this circumstance; and the official assignee was allowed his costs of appearing separately. *Ex parte Bromage*, 375.

4. *Suspending advertisement.*—The official assignee represents the creditors sufficiently to enable the court to suspend the advertisement by consent before the choice of creditors' assignees, although the bankruptcy is disputed. *Ex parte Potts*, 326.

And see OFFICE FEES, 4.

OPENING ACCOUNTS. See ASSIGNEES, 1.

OPENING FIAT. See FIAT, 8.

ORDER FOR SALE.—*Form of order where equitable mortgagee is sole creditors' assignee.*—Form of order upon a petition of an equitable mortgagee who was sole creditors' assignee. *Ex parte Young*, 146.

And see PROOF, 8.

ORIGINAL PETITION. See APPEAL.

PARTICULARS OF DEMAND. See FIAT, 5.

PARTNERS. See PROOF, 4, 9, 10. REPUTED OWNERSHIP, 1, 4.

PETITION.—*Reading examination.*—Examinations before the commissioner cannot be read as evidence on a petition. *Ex parte Rees*, 205.

PETITION TO CHANCELLOR. See APPEAL.

PETITIONING CREDITOR'S DEBT. See FIAT, 8.

PROCEDENDO.—*Reputed ownership in shares.*—A procedendo ordered to issue where a commission had been superseded three years previously by consent of the creditors, on the ground that the bankrupt had not disclosed the fact of his being entitled to shares in a waterworks company, his defence being that the shares were subject to a mortgage for more than their value, but which mortgage turned out to be invalid for want of notice to the company. Shares in such company held subject to the law of reputed ownership, the company's act of parliament declaring them to be personal property. *Ex parte Lawrence*, 269.

PROFITS. See PROOF, 11.

PROMISSORY NOTE. See PROOF, 12.

PROOF.—1. *Banker and customer—Bills of exchange deposited, whether distinct debts.*—A customer pays in bills of exchange to his bankers and becomes bankrupt. The bankers prove for the

whole balance due from him, and afterwards some of the bills of exchange paid in are paid in full by other parties liable, some before and some after the dividend is declared: Held, that the proof ought to be reduced by the amount of the paid bills and the dividends refunded. *Ex parte Hornby*, 60.

2. *Bill of costs of wife's proctor*.—Where a husband sued his wife in an ecclesiastical court for a divorce on the ground of adultery, and before any monition for costs, taxation, or any bill of costs protracted, or any decree, order or sentence, the husband became bankrupt and discontinued the suit: Held, that the wife's proctor might prove against the husband's estate for the amount of his bill of costs. The whole of the costs for executing a commission to examine witnesses, sued previously to but closed after the act of bankruptcy, held to be proveable. *Ex parte Moore*, 173.

3. *Breach of trust—Employment of trust monies in trade—Construction of will*.—A testator directed that it should be lawful for his wife to retain in her hands and employ in his business any part of his assets, not exceeding 6000*l.*, so long as she should think fit, if she should continue his widow, and appointed her and his son executor and executrix. The widow took the son into partnership with her in the trade, and they both became bankrupts: Held, that the use of the 6000*l.* in this trade was not an employment of it in the testator's business according to the direction of the will, but was a breach of trust on which proof might be made against the joint estate. *Ex parte Butterfield*, 319.

4. *Breach of trust—Partners—Change of firm*.—A testatrix bequeathed 3000*l.* to two trustees upon trust to invest it in the funds or on real securities, or to lend it to the house of H. & Co., by whatever firm the same might be called, at interest, with power to vary the securities for others of a like nature. The house of H. & Co. then consisted of the two trustees and two other partners; one of the trustees died, and successive changes took place in the firm, which ultimately consisted of the surviving trustee and a new partner, who had notice of the trust. At the death of the testatrix, the then firm owed to her estate more than 3000*l.*, and that amount, less the legacy duty, was suffered to remain due from them at interest, and was, on the successive changes of the firm, carried over to the credit of the trustees as due from the new firm, and on the last change the surviving trustee took from his partner and himself a promissory note for the amount, payable six months after notice. On the firm becoming bankrupt, held that a breach of trust had been committed, and that there was a right of proof against each separate estate. *Ex parte Poulson*, 79.

5. *Contingent debt—Contract depending on bankruptcy*.—A father bequeaths his business and stock in trade to his sons, with a declaration that a grandson, then an infant, should be admitted into the firm on attaining twenty-one, or in default thereof, that the sons, or the survivor of them, should pay the grandson 1000*l.* on his attaining twenty-one. On the bankruptcy of the surviving son before

the grandson attained twenty-one: Held, that there was a right of proof for the 1000*l.* as a contingent debt. *Ex parte Megarey*, 167.

6. *Dividend—Opening—General right to come in when dividend stayed to let in particular proof.*—Opening dividend at instance of one creditor lets in others to prove. *Ex parte Bowner*, 343.

7. *Dividend—Staying to admit proof.*—Dividend stayed to give opportunity of proving to creditors who had delayed proving for eleven years, no dividend having been declared for upwards of ten years after the fiat issued. *Ex parte Sturton*, 341.

8. *Mortgagee—Proof by, after order for sale only partly carried into effect.*—Where a legal mortgagee had obtained the commissioner's order for the sale of the property comprised in the security, and part of the property had been sold, and the proceeds applied in the reduction of the debt, and the remainder of the property proved unsaleable, the mortgagee was permitted to give up the unsold property and prove for the unpaid portion of his debt. *Ex parte Greaves*, 119.

9. *Partners—Proof against joint estate.*—Where a partner gives a separate security for a joint debt and becomes bankrupt, the other partners remaining solvent, the creditor may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Ex parte the Leicester-shire Banking Company*, 292.

10. *Partners—Notice of dissolution—Rights of transferees of debts due from, continuing to retiring partner.*—On a dissolution of partnership, the retiring gives to the continuing partner a bond for a sum payable by instalments, and after one instalment is paid, it is agreed that the bond shall be cancelled on the obligor giving fresh bonds for sums amounting to the sum then due; such new bonds being executed to obligees nominated by the retired partner. At the time of executing the new bonds the obligor is under some degree of pecuniary pressure, but does not contemplate bankruptcy or insolvency; afterwards he becomes bankrupt: Held, that the new obligees were entitled to prove against his estates, and that the want of any notification of the dissolution of partnership, or of any change in the style of the firm, or of any consideration between the new and old obligees, or between the obligor and the new obligees, would make no difference. *In re Todd*, 87.

11. *Profits arising from misapplied fund.*—Executors pay the legacies bequeathed to infants to their father, who invests them on colonial securities, and makes large profits, and becomes bankrupt: Held, that the legatees were entitled to have proof made upon the whole amount of the profits. *Ex parte Montefiore*, 171.

12. *Promissory note, whether joint or several.*—R. M., who carries on business in partnership with J. C., J. P. and T. S. as bankers, signs one of the notes of the bank in this form, "I promise to pay," &c. "for J. C., R. M., J. P. and T. S., R. M.," on the firm becoming bankrupt: Held, that the holders could not prove on this note against the separate estate of R. M. *In re Clarke*, 153.

13. *Rescinding contract by wrongful stoppage in transitu.*—A vendor of cotton in America, by direction of the purchasers in England, ships the cotton on board a vessel belonging to the latter, who became bankrupt before its arrival. A mortgagee of the ship, who happens to be an agent of the vendor, takes possession of the ship under his mortgage, and sells the cotton under a supposed right on the part of his principal to stop it in transitu; and the principal sanctions the transaction as between himself and the agent, by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then bring an action against the mortgagee for this seizure, and he pays them under a compromise the amount for which the cotton sold: Held, that under the circumstances the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase money. *In re Humberston*, 262.

14. *Set-off—Stoppage in transitu.*—A vendor of cotton in America, by direction of the purchaser in England, ships the cotton on board a vessel belonging to the latter. The purchaser becomes bankrupt, and afterwards the vessel arrives in England, and is taken possession of by a mortgagee in right of his mortgage. The mortgagee happens to be a partner in a firm who are the agents of the vendor, and upon a notice from them claiming a right to stop the cotton in transitu, he permits them to take possession of it. They sell it at a loss, and give their principal credit in his account for the proceeds. The vendor becomes bankrupt. An action of trover for the cotton is commenced against the mortgagee by the purchaser's assignees, and it is compromised upon the terms of the purchaser's assignees proving against the estate of the vendor for the amount of the proceeds for the benefit of the mortgagee, the latter agreeing, in the event of no dividend being paid by a certain day, that judgment for the full amount of the proceeds should be entered up against him in the action. Proof is made accordingly, but no dividend paid, and the mortgagees pay the full amount of the proceeds of the sale to the purchaser's assignees. The vendor's assignees then tender a proof for the original price of the cotton against the estate of the purchaser: Held, that the proof ought to be admitted for the full amount. *Ex parte Molyneux*, 121.

15. *Shares—Legality of transfer of shares in provisionally registered railway company.*—A purchase by brokers, in pursuance of the order of a customer, of shares in a projected railway company provisionally registered, held not illegal, but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by the non-completion of the purchase by the customer. *Ex parte Barton*, 316.

16. *Unliquidated damages.*—An agreement is entered into for the sale of a ship at sea, when she should arrive at her port of discharge, for 4000*l.*, and that within one month after her arrival, or such further time as should be necessary for repairs and discharging the cargo, the purchaser should, on the execution of a bill of sale to him for the vessel, deliver promissory notes for the purchase money, in

default whereof the vendor was to be at liberty to resell, and the purchaser was within a month after the resale to pay the loss occasioned thereby, and if the ship was lost the agreement was to be void. The purchaser becomes bankrupt before the ship arrives, and on the assignees declining to complete the contract, the vendor resells: Held, that he could not prove for the loss occasioned by the resale. *In re Gales*, 100.

RAILWAY COMPANY. See PROOF, 15.

REPUTED OWNERSHIP.—1. *Nominal partnership*—*Right of proof*.—1. A wine merchant carrying on business under the firm of J. R. & Co., announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of J. R. senior, & Co., but as between the uncle and nephew, the latter received a salary only, and did not participate in the capital, profits or losses of the concern. On both becoming bankrupt, held, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle. 2. Part of the stock in trade consisted of wines in the docks, which the uncle on announcing the partnership directed the dock company to deliver to the order of the new firm: Held, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate. 3. Other property consisted of wines in the hands of a lien creditor of the uncle, and after the announcement of the partnership some of the wines were withdrawn and replaced by others in the name of the new firm: Held, that the possession of the lien creditor did not prevent the application of the 72nd section, but that those wines also should, subject to the lien, be administered as joint estate. 4. Where a large number of creditors had a right of election to prove against the joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate. *Ex parte Arbouin*, 359.

2. *Notice—New Zealand land order*.—1. A trader deposits policies of assurance with his bankers to secure the floating balance due from him, and signs a memorandum of the object of the deposit, of which notice is given to the insurance office. Afterwards, he takes a partner, and the policies remain and are treated as a security for the floating balance due from the firm; but of this change in the object of the security no memorandum is signed, nor is any notice given to the office. On the firm becoming bankrupt, held, that the bankers were entitled to the usual order as in the case of an equitable mortgage without a memorandum. 2. A mortgagee of a policy of assurance deposits it by way of submortgage, and gives notice of the submortgage to the insurance office, but not to the original mortgagor: Held, that this was sufficient to take the policy out of the reputed ownership of the mortgagee. 3. A bond, which is executed for the payment of bills of exchange, is mortgaged together with the bills, which are indorsed. Afterwards the mortgagor deposits the

bonds and the bills by way of submortgage, and becomes bankrupt, no notice of the submortgage having been given to the obligor: Held, that the submortgage was good against the assignees. 4. Deposit, by way of mortgage, of a land order of the New Zealand Company held to be good, without notice having been given to the company of the deposit. *Ex parte Barnett*, 194.

3. *Notice—What is sufficient diligence in giving notice of lien to holders of property abroad to prevent reputed ownership.*—London submortgagees of shipments at Ceylon and Hong Kong send thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different route, by which the notices might possibly have sooner reached their destination. Before, however, this could have taken place by either mode of transmission, the submortgagors became bankrupts: Held, that the notice was sufficient to take the goods out of their reputed ownership. A man may give a valid security on merchandize out at sea belonging to him, although at the time he is ignorant of the particulars of which it consists. *Ex parte Kelsall*, 352.

4. *Partnership—Dissolution—Retiring partner.*—Two partners trade under the name of one of them only, and upon a dissolution that one continues the business, the other retiring, but no apparent changes take place in the firm. By the agreement on the dissolution the stock in trade belongs to the continuing partner, who afterwards becomes bankrupt. The stock in trade is sold by his assignees as his separate property, and the retired partner, though cognizant of the fact, makes no objection or claim on the continuing partner becoming bankrupt: Held, that the stock in trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner. *Ex parte Wood*, 134.

And see ACT OF BANKRUPTCY, 1. PROCEDENDO.

RESCINDING CONTRACT. See PROOF, 13.

RESTITUTION.—*Refunding amount received on security.*—Where all parties acted under an impression that a security had been given for the whole amount of a debt, and twenty-one years had elapsed since the security was given, but no evidence could be produced of any contract except one for a security for a limited amount, which was exceeded by the amount received by the creditor upon his security: Held, that the creditor ought not to be called upon to refund. *Ex parte Follett*, 212.

SALE. See ASSIGNEES, 2. ORDER FOR SALE.

SEPARATE ESTATE. See PROOF, 4, 12.

SET-OFF. See ANNUITY. PROOF, 14.

SHARES. See PROCEDENDO. PROOF 15.

SHERIFF.—*Practice—Writs of execution.*—Practice under the new orders as to issuing writs of execution. *Ex parte Grimstead*, 72.

SOLICITOR.—1. *Bill of costs of solicitor to bankrupt suing out*

fiat against himself—Priority of.—Where a bankrupt sued out a fiat against himself, and creditors' assignees were chosen, his solicitor was ordered to be paid the amount of his bill of costs up to the choice out of the first monies received by the assignees. *Ex parte Parson*, 342.

2. Bill of costs of solicitor to fiat—Assets recovered without his assistance—Statute of limitations.—Where the assets had been sold by the assignee on credit, and part only of the purchase money was paid, which was applied in part payment of the bill of costs of the solicitor to the commission, and after a lapse of several years the assignee was ordered to make good the remainder of the purchase money out of his own pocket: Held, that out of this money so made good the solicitor was entitled to be paid the remainder of his bill, although it was recovered without his assistance, and although more than six years had elapsed since the date of the most recent item in the bill. *Ex parte Brutton*, 116.

3. Delivery of proceedings to solicitor to be proved in chancery suit.—Proceedings ordered to be delivered to the bankrupt's solicitor, to be proved in a chancery suit, the solicitor and his agents (who were solicitors of the court) undertaking to return them in a month. *Ex parte Jones*, 28.

4. Lien of bankrupt's solicitor—Right of assignees to inspect documents in his hands.—The right of assignees to inspect or take a copy of a title deed of the bankrupt's property in the hands of his solicitor is no higher than the right of the bankrupt himself; and therefore, where the assignees petitioned that the solicitor might produce or give an attested copy of such document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs. *Ex parte Underwood*, 190.

5. Permission to purchase part of the assets.—Under particular circumstances, solicitor to the fiat permitted to purchase part of the bankrupt's estate. *Ex parte Watts*, 265.

And see ASSIGNEES, 1. OFFICE FEES, 8.

STOPPAGE IN TRANSITU. See PROOF, 13, 14.

SURRENDER.—*Costs of bankrupt petitioning to surrender.*—Where the bankrupt left England on account of his embarrassments, and consequently did not hear of the fiat till after the time for surrendering had expired, he was not allowed his costs on petitioning for leave to surrender. *Ex parte Perry*, 377.

And see FIAT, 2, 3.

TAXATION. See ASSIGNEES, 1.

TRADING.—*Market-gardener.*—A tenant of 180 acres, under a farming lease which obliges him to fallow or plant with peas or potatoes (among other things) every third year, has on his farm 12 acres of young potatoes and 20 acres of green peas growing in open fields every year, and consigns the produce for table consumption to London salesmen, to whom he allows such commission as is usually

allowed by market-gardeners: Held, that he was not a market-gardener within 5 & 6 Vict. c. 122, s. 10. *Ex parte Hammond*, 93.

And see FIAT, 9.

TRANSFER OF SHARES. See PROOF, 15.

TRUST.—1. *Appointing new trustees when there is a question who are the cestuis que trustent.*—Upon a petition to appoint new trustees, the Court of Review will not decide any question as to who are the cestuis que trustent. In case of doubt, all who by possibility may be held to fill that character must be parties. *Ex parte Congreve*, 267.

2. *Impeaching bankrupt's trust deed under his own fiat.*—A trust deed which could not have been impeached under a fiat sued out by any creditor held incapable of being impeached under the bankrupt's own fiat. *Ex parte Philpott*, 346.

And see ASSIGNEES, 3. PROOF, 3, 4.

VALUATION. See ANNUITY.

VENDOR AND PURCHASER.—*Form of clause to enforce restrictive covenant as to building.*—In a contract for a purchase of land there is a stipulation that the conveyance shall be made subject to certain conditions and restrictions as to building upon the land, and to a covenant for their observance, and proper provisions for securing the due performance thereof: Held, that this contract entitled the vendor to have a power of entry inserted in the conveyance in case of a breach of the covenant, but not to have a term of years or a rent charge limited to a trustee. Form of the power of entry, which the vendor is entitled to have. Whether such covenants as the above run with the land, *quære*. *Ex parte Ralph*, 219.

And see PROOF, 13.

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Select Statutes.

[WE have long felt that a mere Digest of a Statute is really a very useless labour. Few Practitioners would venture to rely on it. Nevertheless, it is clear that there are many Statutes essential to Solicitors and useful to Barristers, which, if given verbatim, would materially enhance the value of the LAW MAGAZINE, and render it more completely what we design it to be—A REPERTORY OF ALL THE LEGAL INFORMATION WHICH A PERIODICAL PUBLICATION CAN CONVEY TO THE PROFESSION.

These considerations have determined us in publishing in this portion of our work a Series of Complete Statutes most useful to the practitioner. In order to enhance their utility, arrangements have been made with experienced lawyers, to *note* such Statutes and draw *forms*, wherever it may be useful to do so. A considerable addition to the expense of the work will be thus incurred, but it will, we trust, increase its value to our readers, and proportionably extend its already large sphere of usefulness.]

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10 & 11 VICT. Cap. 33.

An Act to amend the Laws relating to the Removal of poor Persons from England and Scotland.

[21st June, 1847.]

Preamble.

WHEREAS an act was passed in the ninth year of the reign of her majesty, for the removal from England of poor persons who, though born in Scotland, Ireland, or the islands of Man, Scilly, Jersey, or Guernsey, and not settled in England, are chargeable to some parish

in England;¹ and by another act passed in the same year provision was made for the removal from Scotland of poor persons who, though born in England, Ireland, or the Isle of Man, and not settled in Scotland, receive relief from some parish or combination in Scotland:² and whereas it is expedient that certain provisions of the said acts should be amended:

Guardians, &c., in England may take persons removable therefrom under the first-recited act before two justices without summons, &c.

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for any guardian, relieving officer or overseer of any parish or union in England to take and convey before two justices of the peace, without summons or warrant, every poor person who shall become chargeable to any parish in England, and who he may have reason to believe is liable to be removed from England under the first-recited act; and the justices before whom any such person shall be so brought shall hear and examine and proceed in the same manner in all respects as if such person had been brought before them under and in the manner directed by that act.³

2.—Inspectors of the poor in Scotland to take persons removable therefrom under secondly-recited act before sheriff or two justices, without previous complaint, &c.

And be it enacted, that it shall be lawful for any inspector of the poor, or other officer appointed by the parochial board of any parish or combination in Scotland, to take and convey before the sheriff or any two justices of the peace of the county in which the parish or combination for which such inspector or officer acts, or any portion thereof is situated, without previous complaint or warrant in that behalf, every poor person who shall be in the course of receiving parochial relief in any parish or combination in Scotland, and who he may have reason to believe is liable to be removed from Scotland under the secondly-recited act; and the sheriff or justices before whom any such person shall be so brought shall make such examination, and proceed in the same manner in all respects as if such person had been brought before him or them under and in the manner directed by that act.

3.—Persons taking paupers before justices to have powers of constables.

And be it enacted, that every person who by this act is authorized to take and convey any poor person before any sheriff or justices shall, in the execution of this act, in that behalf have and exercise all

¹ 8 & 9 Vict. c. 117.

² 8 & 9 Vict. c. 83, s. 77.

³ That act (c. 83, s. 77) required complaint to be first made by the inspector of the poor, or other officer of the poor law parochial board, that the pauper had become chargeable. The second section here provides that that preliminary may be dispensed with, and that such officers may, *without previous complaint or warrant*, take and convey any such pauper before the sheriff or justices, &c.

the rights, privileges, powers and immunities with which constable is by law invested.¹

4.—*Interpretation of act.*

And be it enacted, that in the construction of this act the singular number or masculine gender shall, except when the context excludes such construction, be understood to include and shall be applied to several persons, matters or things, as well as to one person, matter or thing, and to females as well as males respectively; and that the words "justices of the peace" shall be understood to include and extend to a justice of the peace or magistrate of a county, county of a city, or county of a town, or of any city or town corporate.

5.—*Act may be amended, &c.*

And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

10 & 11 VICT. CAP. 66.

An Act for extending the Provisions of the Law respecting Threatening Letters and accusing Parties with a view to extort Money. [9th July, 1847.]

Preamble.

WHEREAS it is expedient to extend the provisions of so much of the statute made and passed in the seventh and eighth years of the reign of King George the Fourth, intituled "An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith,"² and of an act passed in the ninth year of the reign of King George the Fourth, intituled "An Act for consolidating and amending the Laws in Ireland relative to Larceny and other Offences connected therewith, as relates to the Offences of sending Threatening Letters,"³ and also so much of the statute made and passed in the first year of her majesty's reign, intituled "An Act to amend the Laws relating to Robbery and Stealing from the Person, as relates to the Offence of accusing Persons of unnatural Crimes,"⁴ and to make further provisions for the punishment of such offences:

Persons sending threatening letters, accusing others with certain crimes, with a view to extort money, guilty of felony.

Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that if any person shall knowingly send, or deliver, or utter to any other person, any letter or writing accusing or threatening to accuse either the person to whom such letter or

¹ It was found that this was needed before, and a similar clause, s. 70, was inserted in c. 83.

² 7 & 8 Geo. 4, c. 29.

³ 9 Geo. 4, c. 55.

⁴ 7 Will. 4 & 1 Vict. c. 87.

writing shall be sent or delivered, or any other person, of any crime punishable by law with death or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any crime in and by the said first-mentioned act defined to be an infamous crime, with a view or intent to extort or gain, by means of such threatening letter or writing, any property, money, security, or other valuable thing, from any person whatever, or any letter or writing threatening to kill or murder any other person, or to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw, or other agricultural produce, or shall knowingly procure, counsel, aid or abet the commission of the said offences or either of them, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

2.—*Persons accusing others of crimes hereinbefore mentioned, with a view to extorting money, &c. guilty of felony.*

And be it enacted, that if any person shall accuse or threaten to accuse either the person to whom such accusation or threat shall be made or any other person of any of the crimes hereinbefore specified, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person whatever, any property, money, security or other valuable thing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.¹

10 & 11 Vict. Cap. 67.

An Act to amend the Law as to the Custody of Offenders. [9th July, 1847.]

Preamble.

WHEREAS by an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act for the Transportation of Offenders from Great Britain,"² it was enacted, that it should be

¹ This act extends the scope of these offences. Money need not now have been extorted; the threat suffices; and there were some qualifying words as to "reasonable and probable cause" in the 1 Vict. c. 87, which have been properly omitted in this act.

² 5 Geo. 4, c. 84.

awful for his majesty, by any order or orders in council, to declare his royal will and pleasure that male offenders convicted in Great Britain, and being under sentence or order of transportation, should be kept to labour in any part of his majesty's dominions out of England to be named in such order or orders in council: and whereas it is expedient that it should be made lawful to remove to the same places of confinement any male offender convicted in Ireland who would have been removable thereunto if he had been convicted in Great Britain:

So much of 5 Geo. 4, c. 84, as enacts that male offenders sentenced to transportation may be kept to hard labour out of England extended to offenders convicted in Ireland.

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for one of her majesty's principal secretaries of state to direct that any male offender convicted in Ireland, and being under sentence or order of transportation, may be removed to and confined and kept to labour in any such place of confinement out of England, in like manner as if he had been convicted in Great Britain; and every offender who shall be so removed shall continue in custody, and shall be kept to labour in the place of confinement to be so provided, or any other place of confinement to be from time to time provided by her majesty out of England, until her majesty shall otherwise direct, or until the offender shall be entitled to his liberty; and that all the enactments of the said act relating to the returns to be made concerning every person in custody in each of such places of confinement, and the powers and duties of the superintendent and overseer having the custody of any such offender, and to the treatment of such offenders while so confined, and the time during which they shall be so confined, shall, subject to the amendments made in the said act by an act passed in the last session of parliament, intituled "An Act for abolishing the Office of Superintendent of Convicts under Sentence of Transportation,"¹ apply to all such male offenders convicted in Ireland and removed under the authority of this act, as if they had been convicted in Great Britain and removed under the authority of the first-recited act to such places of confinement.

2.—*Offenders under sentence or order of transportation may be removed to any prison in Great Britain.*

And be it enacted, that it shall be lawful for her majesty, by an order in writing, to be notified in writing by one of her majesty's principal secretaries of state, to direct that any persons under sentence or order of transportation within Great Britain shall be removed from the prisons in which they are severally confined to any other of her majesty's prisons or penitentiaries in Great Britain, there to be confined for such time as her majesty by any such order notified as aforesaid shall direct, not exceeding the time for which they might

¹ 9 & 10 Vict. c. 26.

have been lawfully confined in the prisons from which they shall have been severally removed; and the expense of maintaining any such person in the prison to which he shall be removed under this act, and any other additional expense incurred in such prison in such removal and confinement, shall be defrayed in like manner as the expense of maintaining any such person in any place of confinement appointed under the first-recited act.¹

3.—*Act may be amended, &c.*

And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

10 & 11 VICT. Cap. 78.

An Act to amend an Act for the Registration, Incorporation, and Regulation of Joint Stock Companies [22nd July, 1847.]

Preamble.

WHEREAS by an act passed in the session of parliament holden in the seventh and eighth years of the reign of her present majesty, intituled, "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies,"² it is amongst other things enacted, that on the complete registration of any company being certified in the manner prescribed in the said act, it shall be lawful for such company, amongst other things, to purchase and hold lands, tenements, and hereditaments in the name of such company, or of the trustees or trustee thereof, for the purpose of occupying the same as a place or places of business of the said company, and also (but nevertheless with a license, general or special, for that purpose, to be granted by the committee of privy council for trade, first had and obtained,) such other lands, tenements, and hereditaments as the nature of the business of the company may require: and whereas doubts have in certain cases arisen as to the meaning of the said provision, and it is expedient that such doubts should be removed, and that further provision should be made as to the granting of such licenses as aforesaid by the said committee of privy council:

Any company, having obtained certificate of complete registration, being desirous of holding lands, may apply to the Board of Trade for a license, who may, if they see fit, grant the same

Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that whenever any company, having obtained a certificate of complete registration under the said act, is desirous of purchasing or holding, taking on lease, holding on mortgage, or in

¹ The object of this section, which applies equally to England, is to pave the way for a penitential and reformatory discipline in England in prisons adapted for the purpose before transportation.

² 7 & 8 Vict. c. 110.

any other manner acquiring an interest such as bodies politic or corporate are by law incapacitated from acquiring in any lands, tenements, or hereditaments, other than such as it is under said act entitled to purchase and hold, as a place or places of business, it shall be lawful for such company to make application to the lords of the said committee of privy council for trade for a license to purchase, take, or hold the same; and the lords of the said committee shall thereupon take such application into their consideration, and may, if they see fit, grant a license to such company accordingly; and in such license the lords of the said committee may either authorize such company to purchase, take, and again let, sell, or otherwise dispose of such lands, tenements, or hereditaments, as may in the license be particularly described, and to hold the same for such time as may be specified in such license, or in any license to be subsequently and from time to time granted by the said committee of privy council for trade on the application of such company, or may authorise them from time to time to acquire, dispose of, and again acquire such lands, tenements, or hereditaments as the company may from time to time desire, or may authorize them to hold lands, tenements, or hereditaments on mortgage, and may frame such license in such manner, and insert in the same such conditions, as with reference to the special circumstances of each case they may deem expedient; and such license shall be held to confer upon such company the rights and powers therein expressed to be given in respect of purchasing, holding, and disposing of lands, tenements, or hereditaments as aforesaid.

2.—*Accounts of licenses, renewals, extensions, &c. to be annually laid before parliament.*

And be it enacted, that there shall be presented to both houses of parliament in each year, within fourteen days after the commencement of the session, an account of the several licenses, and renewals or extensions of licenses, so granted by the committee of the privy council for trade, specifying the nature and extent of the powers contained in each of such licenses, and of the lands so authorized to be held, and also, in the case of any renewal or extension of such licenses, an account of the extent of land actually held by the company at the time of such renewal or extension, and the counties within which such lands are situate.

3.—*Licenses granted before passing of this act deemed valid and effectual for the purposes therein expressed.*

And whereas certain licenses have from time to time been granted by the lords of the said committee in pursuance of the said act; be it enacted, that in case any doubt arise as to the effect thereof, it shall be held that any license so granted before the passing of this act is valid and effectual for the purposes therein expressed, and shall be deemed sufficient evidence that the lands, tenements, or hereditaments therein described or referred to, or which have been purchased, taken, held, or disposed of under the authority thereof, are such as the nature of the business of the company requires.

4.—*So much of recited act as requires the return to the office for registration of joint stock companies of a Copy of every prospectus, &c. repealed.*

And whereas by the said recited act, the promoters of any company formed for any purpose within the meaning of the said act are, amongst other things, required to return to the office for the registration of joint stock companies a copy of every prospectus or circular, handbill or advertisement, or other such document, at any time addressed to the public, or to the subscribers or others, relative to the formation or modification of such company: and whereas the registration of such prospectuses and advertisements has been found to be very burdensome to the promoters of such companies, and it is desirable to relieve such promoters from the necessity thereof, and in lieu thereof to substitute the provisions hereinafter contained; be it therefore enacted, that so much of the said act as is lastly hereinbefore recited shall be and the same is hereby repealed.

5.—*Certain additional particulars required to be returned to the office for registration of joint stock companies.*

And be it enacted, that in addition to the particulars which the promoters of every such company as aforesaid are by the said act required to return to the said office for the registration of joint stock companies, when and as from time to time they shall be decided on, such promoters shall also return, and they are hereby required to return, to the said office, the following additional particulars, as soon as the same shall be decided on; (that is to say,)

First. The amount of the proposed capital of the company:

Second. The amount and number of the shares into which the same is to be divided:

And if the said company be dissolved, or be incorporated by act of parliament, or by royal charter or by the queen's letters patent, or be in any way withdrawn or supposed to be withdrawn from the operation of the said act, the promoters of the company shall forthwith give notice thereof to the registrar of joint stock companies.

6.—*If any alterations are made in particulars registered, they shall be returned to the registrar under a penalty.*

And be it enacted, that in case of any alteration being made in any of the particulars registered by the promoters of any company in pursuance of the said recited act or of this act, such alteration shall forthwith be returned to the registrar of joint stock companies; and if such return be not made within one month after such alteration has been made and decided upon, any promoter of the company shall be liable to forfeit for each and every alteration not returned as aforesaid any sum not exceeding twenty pounds.

7.—*Penalty on promoters issuing, at any time before complete registration, any prospectus, &c. containing statement at variance with particulars returned under recited act.*

And be it enacted, that it shall not be lawful for the promoters of any company, or for any person connected with any company, at any time before such company has obtained a certificate of complete registration under the said recited act, to issue or publish or in any

manner address or cause or suffer to be addressed to the public, or to the subscribers or others, any prospectus or circular, handbill or advertisement, or other such document relative to the formation or modification of the company, containing any statement at variance with the particulars which may have been returned to the registrar of joint stock companies under the said recited act or this act, nor to issue, publish, or in any manner address or cause or suffer to be addressed to the public, or to the subscribers or others, any such prospectus, circular, handbill, or advertisement, containing any statements of particulars which are by the said recited act or by this act directed to be returned to the registrar of joint stock companies, until such particulars have been so returned; and if any prospectus or circular, handbill or advertisement, be issued, published, or addressed to the public, or to the subscribers or others, contrary hereto, any promoter of the company shall be liable for each and every such issue or publication to forfeit any sum not exceeding twenty pounds.

8.—*Penalties under this act to be sued for as under recited act.*

And be it enacted, that the penalties imposed by this act shall be sued for, recovered, and applied in the same manner as penalties imposed by the said recited act are therein directed to be sued for, recovered, and applied respectively.

9.—*Act may be amended, &c.*

And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of parliament.

10 & 11 Vict. Cap. 82.

An Act for the more speedy Trial and Punishment of Juvenile Offenders. [22nd July, 1847.]

Preamble.

WHEREAS in order in certain cases to ensure the more speedy trial of juvenile offenders, and to avoid the evils of their long imprisonment previously to trial, it is expedient to allow of such offenders being proceeded against in a more summary manner than is now by law provided, and to give further power to bail them :

Persons not exceeding fourteen years of age committing certain offences may be summarily convicted by two justices.

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that every person who shall, subsequently to the passing of this act, be charged¹ with having committed or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which now is or hereafter shall or may be by law deemed or declared to be simple larceny or punish-

¹ The act of first charging is before the justice.

able as simple larceny,¹ and whose age at the period of the commission or attempted commission of such offence shall not, in the opinion of the justices before whom he or she shall be brought or appear as hereinbefore mentioned, exceed the age of fourteen years,² shall, upon conviction thereof, upon his own confession or upon proof, before any two or more justices of the peace for any county, riding, division, borough, liberty, or place in petty sessions assembled, at the usual place, and in open court, be committed to the common gaol or house of correction within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three calendar months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding three pounds, as the said justices shall adjudge, or, if a male, shall be once privately whipped, either instead of or in addition to such imprisonment, or imprisonment with hard labour; and the said justices shall from time to time appoint some fit and proper person, being a constable, to inflict the said punishment of whipping when so ordered to be inflicted out of prison:

Justices may dismiss the accused if they deem it expedient not to inflict any punishment.

Provided always, that if such justices upon the hearing of any such case shall deem the offence not to be proved, or that it is not expedient to inflict any punishment,³ they shall dismiss the party charged, on finding surety or sureties for his future good behaviour; or without such sureties, and then make out and deliver to the party charged a certificate under the hands of such justices stating the fact of such dismissal, and such certificate shall and may be in the form

¹ The punishment for larceny is that of transportation for seven years or imprisonment for two years with or without hard labour and solitary confinement, 7 & 8 Geo. 4, c. 29, s. 4, (such solitary confinement not to exceed one month at a time, 7 & 8 Will. 4 & 1 Vict. c. 90, s. 5,) with whipping. All offences thus punishable as larcenies before the act passed are now within its scope for juvenile offenders. It thus includes all larcenies at common law, but not larcenies by servants under 7 & 8 Geo. 4, c. 29, s. 46; nor the stealing of cattle; nor of writings under the 23rd section of that act; nor of obtaining goods by false pretences; nor receiving goods knowing them to be stolen; nor in dwelling houses or shops; nor stealing letters, &c.; nor from wrecks; nor for taking conies or rabbits in warrens or fish from fish ponds; nor stealing or dredging for oysters; but it does include "stealing, or severing with intent to steal, ore, &c. from mines," 7 & 8 Geo. 4, c. 20; also "stealing or cutting trees," 7 & 8 Geo. 4, c. 29; also stealing or destroying plants in gardens; also "stealing or cutting lead or metal fixed to any building, &c., or in any square, &c.," 7 & 8 Geo. 4, c. 29, s. 44; also "stealing bills and securities for money, &c., if they relate to goods which it would be simple larceny to steal," 7 & 8 Geo. 4, c. 29, s. 5; also "hunting or stealing deer in enclosed places," 7 & 8 Geo. 4, c. 29, s. 26.

² The age is to be determined by the discretion of the justices. They will be bound nevertheless to require some evidence of the fact.

³ This is a power which must be exercised with great rareness and discretion; the expediency of not punishing a guilty party is of very rare occurrence. Care must be taken not to allow this to give rise to charges of partiality.

or to the effect set forth in the schedule hereto annexed in that behalf: Provided also, that if such justices shall be of opinion, before the person charged shall have made his or her defence, that the charge is from any circumstance a fit subject for prosecution by indictment, or if the person charged shall, upon being called upon to answer the charge object to the case being summarily disposed of under the provisions of this act, such justices shall, instead of summarily adjudicating thereupon, deal with the case in all respects as if this act had not been passed.¹

2.—Power to justices to hear and determine.

And be it enacted, that any two or more justices of the peace for any county, riding, division, borough, liberty, or place in petty sessions assembled, and in open court, before whom any such person as aforesaid charged with any offence made punishable under this act shall be brought or appear, are hereby authorized to hear and determine the case under the provisions of this act:

One magistrate may, in certain cases, perform acts usually done by two.

Provided always, that any magistrate of the police courts of the metropolis sitting at any such police court, and any stipendiary magistrate sitting in open court, having by law the power to do acts usually required to be done by two or more justices of the peace, shall and may within their respective jurisdictions hear and determine every charge under this act, and exercise all the powers herein contained, in like manner and as fully and effectually as two or more justices of the peace in petty sessions assembled as aforesaid can or may do by virtue of the provisions in this act contained.

3.—Proceedings under this act a bar to further proceedings.

And be it enacted, that every person who shall have obtained such certificate of dismissal as aforesaid, and every person who shall have been convicted under the authority of this act, shall be released from all further or other proceedings for the same cause.²

4.—Mode of compelling the appearance of persons punishable on summary conviction.

And for the more effectual prosecution of offences punishable upon summary conviction by virtue of this act, be it enacted, that where any person whose age is alleged not to exceed fourteen years shall be charged with any such offence on the oath of a credible witness before any justice of the peace, such justice may issue his summons or warrant to summon or to apprehend the person so charged to appear before any two justices of the peace in petty sessions assembled as aforesaid at a time and place to be named in such summons or warrant.

¹ This power to the party charged to require the proceedings to stand over to the sessions or assizes will be of very unusual occurrence: it will oftener happen that when the law of the case shall be doubtful the justices themselves will discreetly prefer that the responsibility of deciding it shall not fall upon them.

² This will not affect the power of sentencing afterwards as for previous convictions. The convictions under this act will still be for felonies, and therefore satisfy the terms of 7 & 8 Geo. 4, c. 28.

5.—Power to one Justice to remand and take bail.

And be it enacted, that any justice or justices of the peace, if he or they shall think fit, may remand for further examination or for trial, or suffer to go at large upon his or her finding sufficient surety or sureties, any such person as aforesaid charged before him or them with any such offence as aforesaid; and every such surety shall be bound by recognizance to be conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace in petty sessions assembled as aforesaid, or for trial at some superior court, as the case may be; and every such recognizance may be enlarged from time to time by any such justice or justices to such further time as he or they shall appoint; and every such recognizance which shall not be enlarged shall be discharged without fee or reward, when the party shall have appeared according to the condition thereof.

6.—Application of fines.

And be it enacted, that every fine imposed by any justices under the authority of this act shall be paid to the clerk to the convicting justices, and shall be by him paid over to the use of the general county rate, or rate in the nature of a general county rate, for the county, riding, division, borough, liberty, franchise, city, town, or place in which the offence in respect of which such fine shall be imposed may have been committed.

7.—As to the summoning and attendance of witnesses.

And be it enacted, that it shall be lawful for any justice of the peace by summons to require the attendance of any person as a witness upon the hearing of any case before two justices, under the authority of this act, at a time and place to be named in such summons; and such justice may require and bind by recognizance all persons whom he may consider necessary to be examined touching the matter of such charge to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge; and in case any person so summoned or required or bound as aforesaid shall neglect or refuse to attend in pursuance of such summons or recognizance, then, upon proof being first given of such person's having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, it shall be lawful for the justices before whom any such person ought to have attended to issue their warrant to compel his appearance as a witness.

8.—Service of summons.

And be it enacted, that every summons issued under the authority of this act may be served by delivering a copy of the summons to the party, or by delivering a copy of the summons to some inmate at such party's usual place of abode, and every person so required, by any writing under the hand or hands of any justice or justices, to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

9.—*Form of conviction.*

And be it enacted, that the justices before whom any person shall be summarily convicted of any such offence as hereinbefore mentioned may cause the conviction to be drawn up in the form of words set forth in the schedule to this act annexed, or in any other form of words to the same effect, which conviction shall be good and effectual to all intents and purposes.

10.—*No certiorari, &c.*

And be it enacted, that no such conviction shall be quashed for want of form, or be removed by certiorari or otherwise into any of her majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

11.—*Convictions to be returned to the Quarter Sessions.*

And be it enacted, that the justices of the peace before whom any person shall be convicted under the provisions of this act shall forthwith thereafter transmit the conviction and recognizances to the clerk of the peace for the county, borough, liberty, or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court of general quarter sessions of the peace; and the said clerk of the peace shall transmit to one of her majesty's principal secretaries of state a monthly return of the names, offences, and punishments mentioned in the convictions, with such other particulars as may from time to time be required.

12.—*No forfeiture upon convictions under act, but presiding justices may order restitution of property.*

And be it enacted, that no conviction under the authority of this act shall be attended with any forfeiture, but whenever any person shall be deemed guilty under the provisions of this act it shall be lawful for the presiding justices to order restitution of the property in respect of which such offence shall have been committed to the owner thereof or his representatives, and if such property shall not then be forthcoming, the same justices, whether they award punishment or dismiss the complaint, may inquire into and ascertain the value thereof in money, and if they think proper order payment of such sum of money to the true owner, by the person or persons convicted, either at one time or by instalments at such periods as the court may deem reasonable, and the party or parties so ordered to pay shall be liable to be sued for the same as a debt in any court in which debts may be by law recovered, with costs of suit, according to the practice of such court.

13.—*Recovery of penalties*

And be it enacted, That whenever any justices of the peace shall adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this act, and such penalty shall not be forthwith paid, it shall be lawful for such justices, if they shall deem it expedient, to appoint some future day for the payment of such penalty, and to order the offender to be detained in safe custody until the day

so to be appointed, unless such offender shall give security to the satisfaction of such justices for his or her appearance on such day ; and such justices are hereby empowered to take such security by way of recognizance or otherwise, at their discretion ; and if at the time so appointed such penalty shall not be paid, it shall be lawful for the same or any other justices of the peace, by warrant under their hands and seals, to commit the offender to the common gaol or house of correction within their jurisdiction, there to remain for any time not exceeding three calendar months, reckoned from the day of such adjudication, such imprisonment to cease on payment of the said penalty.

14.—Expenses of prosecutions how to be paid.

And be it enacted, that the justices in petty sessions assembled as aforesaid, before whom any person shall be prosecuted or tried for any offence cognizable under this act, are hereby authorized and empowered, at their discretion, at the request of the prosecutor or of any other person who shall appear on recognizance or summons to prosecute or give evidence against any person accused of any such offence, to order payment to the prosecutor and witnesses for the prosecution of such sums of money as to the justices shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein, and to order payment to the constables and other peace officers for the apprehension and detention of any person or persons so charged ; and although no conviction shall actually take place, it shall be lawful for the said justices to order all or any of the payments aforesaid when they shall be of opinion that the parties or any of them have acted *bonâ fide* ; and the amount of expenses of attending before the examining magistrate, and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the said petty sessions, shall be ascertained by and certified under the hands of the justices in such petty session assembled as aforesaid : provided always, that the amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of forty shillings : provided also, that no expenses shall be allowed to prosecutors, witnesses and constables exceeding the sums allowed, according to a scale of fees and allowances authorized and settled by the justices of the peace at quarter sessions assembled, according to the statute in such case made and provided with respect to preliminary inquiries before justices of the peace in cases of felony.

15.—Orders for payment how to be made.

And be it enacted, that every such order of payment to any prosecutor or other person, after the amount thereof shall have been

certified by the justices as aforesaid, shall be forthwith made out and delivered by the clerk of the said petty session unto such prosecutor or other person, upon such clerk being paid for the same the sum of sixpence for every such person, and no more, and, except in cases hereinafter provided for, shall be made upon the treasurer of the county, riding or division in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby authorized and required, upon sight of every such order, forthwith to pay to the person named therein, or to any other person duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts: provided always, that no such order shall be valid, nor shall such treasurer pay any money thereon, unless it shall have been framed and presented in such form and under such regulations as the justices of the peace in quarter sessions assembled shall from time to time direct.

16.—*Payment of costs and expenses with respect to boroughs, &c.*

And whereas offences cognizable under this act may be committed in liberties, franchises, cities, towns and places which do not contribute to the payment of any county rate, some of which raise a rate in the nature of a county rate, and others have neither any such rate nor any fund applicable to similar purposes, and it is just that such liberties, franchises, cities, towns and places should be charged with all costs, expenses and compensations ordered by virtue of this act in respect of such offences as aforesaid committed or supposed to have been committed therein respectively; be it therefore enacted, that all sums directed to be paid by virtue of this act in respect of such offences as aforesaid committed or supposed to have been committed in such liberties, franchises, cities, towns and places shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund, and where there is no such rate or fund in such liberties, franchises, cities, towns or places, shall be paid out of the rate or fund for the relief of the poor of the parish or township, district or precinct therein, where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund; and the order of court shall in every such case be directed to such treasurer, overseers or other officers respectively, instead of the treasurer of the county, riding or division, as the case may require.

17.—*Proceedings against persons acting under this act.*

And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed, and not otherwise; and notice in writing of such action or

prosecution, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action or prosecution; and in any such action or prosecution the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action or prosecution after issue joined, or if upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in such action, the plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon.

18.—*Extent of act.*

And be it enacted, that nothing in this act contained shall extend to Scotland or Ireland.

19.—*Act may be amended, &c*

And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.¹

SCHEDULE of Forms to which this Act refers.

Form of certificate of dismissal.

to wit. } WE of her majesty's justices of the peace for the
 } county of (or "I, a magistrate of the Police Court
of ," as the case may be), do hereby certify, that on the
day of , in the year of our Lord , at , in the said
county of , M. N. was brought before us the said justices [or
"me the said magistrate"] charged with the following offence, that
is to say, [here state briefly the particulars of the charge], and that
we the said justices [or "I the said magistrate"] thereupon dismissed
the said charge. Given under our hands [or "my hand"] this
day of .

Form of conviction.

to wit. } Be it remembered, that on the day of , in the
 } year of our Lord one thousand eight hundred and ,
at , in the county of , [or "riding," "division," "liberty,"
"city," &c. as the case may be,] A. O. is convicted before us, J. P.
and Q. R., two of her majesty's justices of the peace for the said
county [or "riding," &c.], [or "me, S. T., a magistrate of the Police

¹ This act is designed to relieve the superior courts of their growing work, and to prevent the imprisonment of children for long periods before trial.

Court of ", as the case may be], for that he the said A. O. did [specify the offence, and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence], and we the said J. P. and Q. R. [or "I the said S. T."] adjudge the said A. O. for his said offence to be imprisoned in the [or "to be imprisoned in the and there kept to hard labour for the space of "], [or "we" or "I adjudge the said A. O. for his said offence to forfeit and pay "], [here state the penalty actually imposed], and in default of immediate payment of the said sum to be imprisoned in the [or "to be imprisoned in the and there kept to hard labour"] for the space of , unless the said sum shall be sooner paid. Given under our hands and seals [or "my hand and seal"] the day and year first above mentioned.

10 & 11 VICT. CAP. 102.

An Act to abolish the Court of Review in Bankruptcy, and to make Alterations in the Jurisdiction of the Courts of Bankruptcy and Court for Relief of Insolvent Debtors.¹ [22d July, 1847.]

Preamble.

WHEREAS it is expedient to abolish the Court of Review in Bankruptcy, and to make alterations in the jurisdiction of the Courts of Bankruptcy and Court for the Relief of Insolvent Debtors;

Court of Review abolished.

Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the Court of Review in Bankruptcy and the offices of the chief judge and other judges of the Court of Bankruptcy be hereby abolished.

2.—Jurisdiction of Court of Review transferred to one of the vice-chancellors.

And be it enacted, that all the jurisdiction, powers, authorities, and privileges of the said Court of Review in Bankruptcy hereby abolished shall be transferred to and vested in and shall hereafter be exercised and enjoyed by such one of the vice-chancellors of the High Court of Chancery as the lord chancellor shall from time to time be pleased to appoint, and that all persons now holding office or acting in the said Court of Review shall continue to hold the same, and to perform the duties thereof under the jurisdiction hereby created, in the same manner and under the same tenure and subject to the same regulations as they now hold the same and act therein: provided always, that notwithstanding the passing of this act the present judges of the Court of Review shall be entitled to the same rank and precedence to which they are now entitled.

¹ This is simply an act of transfer. It contains no new provisions which render it a fit subject of annotation.

3.—*Laws and orders to apply to vice-chancellor so sitting.*

And be it enacted, that all laws, orders and authorities touching the practice and manner of proceeding in the said Court of Review, and appealing to and from the said court, shall continue in force, and be applicable to the jurisdiction of the said vice-chancellor so appointed; and that all sums and fees shall continue to be payable and receivable by the like persons, and shall continue to be paid and applied to the like purposes, as the same have heretofore been paid and received in respect of any matter in the said Court of Review.

4.—*Jurisdiction of Courts of Bankruptcy under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 8 & 9 Vict. c. 127, transferred to Court for the Relief of Insolvent Debtors and to the County Courts.*

And be it enacted, that from the time this act shall commence and take effect all power, jurisdiction and authority given to her majesty's Court of Bankruptcy and District Courts of Bankruptcy, and to the commissioners thereof, in matters of insolvency, by an act passed in the sixth year of the reign of her majesty, intituled "An Act for the Relief of Insolvent Debtors," and by an act passed in the eighth year of the reign of her majesty, intituled "An act to amend the Law of Insolvency, Bankruptcy and Execution," and by an act passed in the ninth year of the reign of her majesty, intituled "An Act for better securing the Payment of Small Debts," or by the rules and orders made in pursuance of any of the said acts, shall be transferred to and vested in the Court for the Relief of Insolvent Debtors in England, and to and in the commissioners thereof for the time being, and to and in the County Courts constituted or to be constituted under an act passed in the tenth year of the reign of her majesty, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," in manner hereinafter mentioned.¹

5.—*In Insolvent Debtors Court the provisional assignee, and in County Courts the clerk, to act as official assignee.*

And be it enacted, that in the Court for the Relief of Insolvent Debtors the provisional assignee, and in the said County Courts the clerk of the court, shall in every case of insolvency under such two first mentioned acts be and act as the official assignee of the estate and effects of the insolvent; and that in each of the said County Courts the clerk of such court shall act as the registrars of the Court of Bankruptcy have heretofore been accustomed to act under any of the said acts; and every such clerk shall do and perform all acts heretofore done and performed by such registrars or by the clerk of the Insolvent Debtors Court under any of the said acts; and every such clerk shall do and perform all such acts and duties necessary for carrying this act into effect as shall be ordered by any such County Court, or by any commissioner of the said Court for the Relief of Insolvent Debtors; and that the high bailiff of every such County Court and his assistants shall be and act as a messenger

¹ The 9 & 10 Vict. c. 95. It is much to be wished that the judges of these courts were more competent to the work they have in hand, before this large increase of their functions takes place.

of the Court of Bankruptcy and his assistants have hitherto been accustomed to act under the said acts; and such high bailiff and his assistants shall do all acts heretofore done under the said acts, and shall possess and enjoy all the powers, authorities and privileges when acting under the said acts as have been heretofore done, possessed or enjoyed by any messenger of the Court of Bankruptcy or his assistants when acting under any of the said acts, and shall do and perform all such acts as shall be ordered by any such County Court for the purpose of carrying this act into effect.

6.—Jurisdiction of Insolvent Debtors Court and County Courts.

And be it enacted, that from the time this act shall commence and take effect, the Court for the Relief of Insolvent Debtors in England, and the commissioners thereof, and the judges of the County Courts aforesaid, shall have jurisdiction in all matters of insolvency and debt under the aforesaid acts in manner following, that is to say, the said Court for the Relief of Insolvent Debtors, and the commissioners thereof, in all cases in which the insolvent in cases of insolvency, or the defendant in the case of any summons issued under the aforesaid act for the better securing the payment of small debts, shall have resided for six calendar months next immediately preceding the time of filing his petition, or of the suing out of any such summons aforesaid within any parish, the distance whereof, as measured by the nearest highway from the general post office in London to the parish church of such parish, shall not exceed the distance of twenty miles, to which district the jurisdiction of the said court and the commissioners thereof under the aforesaid acts is hereby restricted; and the said County Courts aforesaid in all cases wherein the insolvent or defendant shall have resided elsewhere, and shall have resided for six calendar months next immediately preceding the time of filing his petition, or the suing out of any summons within the district of such County Court to which such insolvent shall prefer his petition, or to which any plaintiff may apply for any summons as aforesaid; and that every commissioner of the Court for the Relief of Insolvent Debtors, and every such County Court aforesaid, shall, from and after the time this act shall commence and take effect, have and exercise, in the prosecution of such petitions and summonses filed and issued in such courts respectively, the like power and authority in all respects under the aforesaid acts as the commissioners of her majesty's Court of Bankruptcy and District Courts of Bankruptcy have heretofore had and exercised on the presentation of petitions of insolvent debtors, and on such summonses as aforesaid, under such acts, except as hereinafter otherwise provided, and shall each, singly, be and form a court for every purpose under this or the aforesaid acts; and that every commissioner of the said Court for the Relief of Insolvent Debtors shall henceforth, singly, be and form a court for every purpose under all acts now in force or which may hereafter be in force relating to insolvent debtors.

7.—Recited acts to apply to persons petitioning who have been in prison.

And be it declared and enacted, that the said two first mentioned acts

shall apply to the cases of persons petitioning under the said acts, although they may have been already in prison under judgment or otherwise for debt.

8.—*If insolvent shall not have resided six months, jurisdiction vested in Insolvent Court or County Court.*

Provided always, and be it enacted, that if any such insolvent shall not have so resided for six months in any one place as aforesaid, then he shall file his petition in the said Insolvent Debtors Court, and the jurisdiction aforesaid in the matter of such insolvency shall be vested either in the Court for the Relief of Insolvent Debtors in London, or in such one of the said County Courts as the said Court for the Relief of Insolvent Debtors shall direct.

9.—*Petitions now pending under recited acts, &c., to be disposed of notwithstanding the passing of this act.*

And be it enacted, that with respect to petitions under the aforesaid acts or either of them which are now in dependence, or which shall have been presented to the Court of Bankruptcy or any District Court of Bankruptcy before the time at which this act shall commence and take effect, the provisions of such acts, and the jurisdiction of such courts and the commissioners thereof under such acts, or under the rules and orders made in pursuance thereof, shall remain in full force and effect notwithstanding the passing of this act.

10.—*Jurisdiction of the Court for the Relief of Insolvent Debtors on circuit transferred to County Courts.*

And be it enacted, that from and after the fifteenth day of September next the circuits of the commissioners of the said Court for the Relief of Insolvent Debtors shall be abolished; and that if thereafter any insolvent debtor in custody in any of her majesty's gaols situated elsewhere than within the district to which the jurisdiction of such court is restricted as herein-before mentioned shall petition such court under any act or acts relating to insolvent debtors, other than the two first-mentioned acts or this act, or if any such prisoner shall have so petitioned prior to the passing of this act, and his petition shall not have been heard, or if the same shall have been heard and the consideration thereof shall have been adjourned, such court or some commissioner thereof shall forthwith, after the schedule of such prisoner shall have been duly filed in the case of any new petition, and at any time which to such court or commissioner shall seem fit in the case of any petition which shall not have come on for hearing, or the hearing of which shall have been adjourned as aforesaid, make an order referring such petition for hearing to the County Court within the district of which such insolvent debtor is in custody, and shall transmit such petition and schedule to such court for hearing accordingly; and that the judge of such court shall appoint a time and place for such prisoner to be brought up before such court, and cause the usual notices to be given; and that any court to which any such petition shall be so referred and transmitted shall have and possess the same power and authority with respect to every such petition, and shall make all such orders, give all such directions, and

do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, his schedule, creditors, and assignees, as the said Court for the Relief of Insolvent Debtors or any commissioner thereof might make, give, or do in the matters of petitions heard before such court or commissioner under such acts; and that every such petition and schedule, and all judgments, rules, orders, directions, and proceedings pronounced, made, and done thereon in all and every the matters aforesaid by such County Court, shall be returned to the said Court for the Relief of Insolvent Debtors, signed by the judge of such County Court, to be a record of the said court for the relief of insolvent debtors, and to be kept as such among the records thereof; and the said Court for the Relief of Insolvent Debtors, and every commissioner thereof, in every case in which any insolvent debtor petitioning the Court for the Relief of Insolvent Debtors under such acts shall be in custody in any of her majesty's gaols within the district to which the jurisdiction of such court is limited aforesaid, and the County Courts in the matter of every such petition so referred and transmitted for hearing as aforesaid, shall have power to issue a warrant or order, directed to the governor, keeper, or gaoler of any gaol, directing him to bring the insolvent before the County Court on the day appointed for the hearing of his petition, or at any adjourned sitting held in the matter of this petition, and every such governor, keeper, or gaoler shall obey such warrant; and every such court may order the expense attending the bringing up of every such insolvent to be paid by the provisional assignee out of the estate and effects of such insolvent, or if there be no estate, or the same be insufficient for such purpose, out of the interest and profit arising from any government securities upon which any unclaimed money produced by the estates and effects of insolvent debtors may be invested.

11.—*Recognizances of sureties entered into under 1 & 2 Vict. c. 110, for enforcing attendance of insolvents, to bind persons to appear before County Courts.*

And whereas in pursuance of an act passed in the second year of the reign of her majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," divers persons as sureties have entered into recognizances to the provisional assignee of the Insolvent Debtors Court, with conditions that the insolvents therein mentioned should duly appear at the times and places therein mentioned, and it is necessary that some of such insolvents should appear before the County Courts under this act; be it therefore enacted, that every such recognizance shall extend to bind the persons who may have entered into the same, in case the insolvent debtor therein mentioned shall not at the time appointed in such recognizance duly appear before the County Court to which the matter of such insolvent is transferred by this act and on every adjourned hearing, or shall not abide by the final judgment of such court.

12.—*Fees in Insolvent Debtors Court to go in reduction of certain compensations to its officers.*

And whereas in consequence of late alterations in the laws of imprisonment for debt certain compensations have become payable and are paid by the commissioners of her majesty's treasury to the officers of the Court for the Relief of Insolvent Debtors in respect of the diminution of fees received therein: And whereas by the additional business given to the said court by this act the fees payable therein will again be increased, whereby a less sum will be required for the said compensations; be it enacted, that the fees to be received in the said court in matters where jurisdiction is given by this act shall be received by the same persons, to be by them applied in the same manner as the fees received in matters heretofore under the jurisdiction of the said court are now applied, any thing herein to the contrary notwithstanding: provided always, that it shall be lawful for the commissioners of her majesty's treasury for the time being, or any three of them, and they are hereby empowered, to give such directions as they shall think proper in regard to the compensation allowances now payable to the officers and clerks of the Court for the Relief of Insolvent Debtors in England, under the provisions of the said recited act passed in the eighth year of the reign of her majesty, in consequence of the fees to be received by them being again increased by the operation of this act.

13.—*Power to secretary of state to order what fees are to be paid to officers under 9 & 10 Vict. c. 95, and this act. Until such order made, clerks and bailiffs to receive all fees as heretofore.*

And be it enacted, that it shall be lawful for one of her majesty's principal secretaries of state, with the consent of the commissioners of her majesty's treasury, from time to time to order what fees shall be paid and received by the several officers or otherwise under and by virtue of the said recited act passed in the tenth year of the reign of her majesty and of this act, and the amount of such fees respectively; and that until such order shall be made, the clerks of the several County Courts shall have and receive for their own use all fees which have heretofore been taken under any of the aforesaid acts by any officer of the Court of Bankruptcy, or by any officer or other person of or connected with the Court for the Relief of Insolvent Debtors, except as hereinafter mentioned, for business which is by this act transferred to the County Courts: and that the several high bailiffs acting as messengers under this act as aforesaid shall have and receive for their own use all fees which have heretofore been paid to the messengers of the Court of Bankruptcy when doing the business by this act directed to be done by such bailiffs.

14.—*Lord Chancellor may give directions for sittings of Court of Bankruptcy elsewhere than in London.*

And whereas it may be expedient that the Court of Bankruptcy in London should hold sittings in matters of bankruptcy at some place or places within the district over which the jurisdiction of such court extends, at which such court hath not hitherto been used to sit; be it

declared and enacted, that it shall be lawful for the lord chancellor, at any time or times whenever it shall appear to him to be expedient, by any order or orders to give the necessary directions in that behalf, ordering any commissioner, registrar, official assignee, messenger, or usher of the Court of Bankruptcy in London to sit and attend and act in the prosecution of any fiat in bankruptcy at any place elsewhere within such district than in the city of London; and every commissioner, registrar, official assignee, messenger, and usher so sitting, attending, and acting shall have the like power, jurisdiction, and authority as if sitting, attending, and acting in the prosecution of such fiat in London.

15.—*Lord Chancellor may order payment of travelling and other expenses.*

And be it enacted, that any commissioner or registrar so sitting and acting shall have paid to him, in addition to his salary, by the governor and company of the Bank of England, by virtue of any order or orders of the lord chancellor to be made from time to time for that purpose, out of the interest and dividends that have arisen or may arise from the securities now or hereafter to be placed in the Bank of England to an account there, intituled "The Bankruptcy Fund Account," (but subject and without prejudice to any prior charges on the same,) such sum of money for travelling and other expenses as the lord chancellor shall deem fit.

16.—*Forms may be altered.*

And be it enacted, that the forms given in the schedules to any of the said acts, or any forms heretofore used under the said acts, may be altered so far as to adapt them to the change of jurisdiction by this act directed.

17.—*Vacancies not to be filled up till after the termination of the next session of parliament.*

And be it enacted, that the office of the first one of the commissioners of the Court for the Relief of Insolvent Debtors, and of the first two of the commissioners of the Court of Bankruptcy in London, which will become vacant after the passing of this act, shall not be filled up until after the termination of the session of parliament next after such vacancies shall have occurred.

18.—*Judges of County Courts incapable of being members of parliament.*

And be it enacted, that no judge of any County Court who has been appointed or who shall hereafter be appointed to that office under or by virtue of the herein-before recited act passed in the tenth year of the reign of her majesty, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," shall, during his continuance in such office, be capable of being elected or of sitting as a member of the house of commons.

19.—*Interpretation of "the Lord chancellor."*

And be it enacted, that the words "lord chancellor" shall in the construction of this act be interpreted to mean also and include the lord keeper and lords commissioners for the custody of the great seal of the united kingdom for the time being.

20.—*Commencement of this act.*

And be it enacted, that this act shall commence and take effect from the fifteenth day of September one thousand eight hundred and forty-seven.

21.—*Act may be amended, &c.*

And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

10 & 11 VICT. CAP. 110.

An Act to amend the Laws relating to the Removal of the Poor, until the First Day of October, One thousand eight hundred and forty-eight.

[23rd July, 1847.]

Preamble.

WHEREAS by an act passed in the last session of parliament, intitled "An Act to amend the Laws relating to the Removal of the Poor," it was, amongst other things, enacted as follows, "that from and after the passing of this act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant; provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving her majesty as a soldier, marine or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a bonâ fide charitable gift, shall for all purposes be excluded in the computation of time herein-before mentioned, and that the removal of a pauper lunatic to a lunatic asylum under the provisions of any act relating to the maintenance and care of pauper lunatics shall not be deemed a removal within the meaning of this act; provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable when he or she is removable, and shall not be removable when he or she is not removable:" and whereas the effect of the above-recited enactment has been to increase unduly the amount of expenditure for the relief of the poor in particular parishes:

Expenditure incurred by any parish, &c. for maintenance, &c. of persons who are or may be by the above recited enactment exempted from liability to be charged to the union.

Be it therefore enacted by the queen's most excellent majesty, by

and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all the expenditure which shall be incurred by any parish, township or place forming part of a union for the maintenance, relief or burial of any person or persons who shall have been at any time within one year before the passing of the above-recited enactment in the receipt of relief from some other parish, township or place, by right of settlement or reputed settlement therein, and who by the above-recited enactment are or may be exempted from the liability to be removed from the parish, township or place in which such person or persons shall be residing, shall from and after the passing of this act, so long as such person or persons shall continue to be so exempted, be charged to the common or general fund of such union in the same manner as the cost of building or providing workhouses in unions and other union expenses are directed to be charged by an act passed in the fifth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales."¹

2.—*Continuance of act.*

And be it enacted, that this act shall continue in force until the first day of October in the year one thousand eight hundred and forty-eight.

3.—*Act may be amended, &c.*

And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

¹ This complicated clause means this,—Be it enacted, that the support of all paupers who have been chargeable since a year before the passing of the 9 & 10 Vict. c. 66, and who are or may be made irremovable by it, shall be charged on the union, and not on the parish in which they are inhabiting, in the same way as all other union expenses are charged.

[Some other Statutes will appear in the Magazine for February.]

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Showing whether they relate to the Whole or to any Part of the
United Kingdom, viz.

E. signifies that the Act relates to England (and Wales; if the Subject extends *u/it*);
S......Scotland.
I......Ireland.
W......Wales.
E. & I.England and Ireland.
G. B.Great Britain.
G. B. & I.Great Britain and Ireland.
U. K.The whole of the United Kingdom.

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